Mr. Justice Swayne

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 174.

STEPHEN D. HOSMER, PLAINTIFF IN ERROR,

vs.

WILLIAM T. WALLACE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED SEPTEMBER 30, 1876.

SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges
[SEAL.] of the supreme court of the State of California, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between Stephen D. Hosmer, appellant, and William T. Wallace, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United
2 States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the thirteenth day of April, in the year of our Lord one thousand eight hundred and seventy-six.

Issued 13 April, 1876.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by me the 31st day of January, A.D. 1876.

STEPHEN J. FIELD,
Associate Justice of U. S. Sup. Court.

(Indorsed:) No. 3430. Hosmer vs. Wallace. Writ of error. Filed May 30, 1876. D. B. Woolf, clerk, by H. P. Bush, deputy.

3 The United States of America to William T. Wallace, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of California, wherein Stephen D. Hosmer is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness Stephen J. Field, associate justice of the Supreme Court of

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges [SEAL.] of the supreme court of the State of California, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between Stephen D. Hosmer, appellant, and William T. Wallace, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United
2 States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

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Witness Stephen J. Field, associate justice of the Supreme Court of

the United States, this thirteenth day of April, in the year of our Lord one thousand eight hundred and seventy-six.

STEPHEN J. FIELD.

Service of the within citation acknowledged this 30th day of May, A. D. 1876.

GEO. A. NOURSE,
Att'y for W. T. Wallace, the Def't in Error.

(Indorsed:) No. 3430. Hosmer vs. Wallace. Citation. Filed May 30, 1876. D. B. Woolf, clerk, by H. P. Bush, deputy.

3½ *Complaint.*

In the supreme court of the State of California.

STEPHEN D. HOSMER, PLAINTIFF,
vs.
WILLIAM T. WALLACE, DEFENDANT.

In the district court of the third judicial district of the State of California, in and for the county of Santa Clara.

The above-named plaintiff, Stephen D. Hosmer, complains of the above-named defendant, William T. Wallace, and for cause of action alleges that in the month of October, of the year 1856, he was permanently settled upon the north half of the north half of section one, in township seven south and range two west, Mount Diablo meridian,
4 according to United States survey; and that said north half of the north half of said section one contains 160 48-100 acres of land, and no more. He further alleges that said tract of land, and the whole thereof, is now, and was at the time of his settlement aforesaid, within the county of Santa Clara, in the State of California.

Plaintiff alleges that in the month of October, 1856, after his settlement on said north half of the north half of said section one, he had valuable and lasting improvements thereon, consisting of a dwelling-house, outhouses, and fences, of the aggregate value of $400 or thereabouts.

Plaintiff further alleges that he made his said settlement, as aforesaid, upon said lands for the purpose of holding and claiming in good faith, for his own exclusive use and benefit, a pre-emption right thereon under the laws of the United States of America; and he further alleges that he did not quit or abandon his residence on his own land to settle on the said lands so settled on and improved by him as aforesaid, nor was he then, nor has he been at any time since, the owner of three hundred and twenty acres of land.

Plaintiff further alleges that he did not settle upon or improve said land to sell the same, or any part thereof, to any one, but he alleges
5 that he settled upon the same for the purpose of appropriating it to his own exclusive use and benefit as a pre-emption right under the laws of the United States.

Plaintiff further alleges that during the month of October, 1856, he was, and has been ever since, and is now a native born citizen of the United States of America, over the age of twenty-one years, and a single man.

Plaintiff further alleges that in the said month of October, 1856, he

was in the exclusive possession of the whole of the north half of the northeast quarter, and the northeast quarter of the northwest quarter of said section one, claiming a pre-emption right thereon, under the laws of the United States of America, and that he has continued in the exclusive possession, and to cultivate and improve the whole thereof, from thence to the present time, with the exception of a portion thereof, from some time in the year 1862, at which time he was, by process of law, dispossessed of such portion thereof as hereinafter stated.

Plaintiff further alleges that in the month of October, 1856, and from thence to the year 1865, the north half of the northeast quarter of said section one was claimed by parties other than this plaintiff, to be within the exterior boundaries and to form a part of a Mexican
6 grant commonly called "Pastoria de los Borregas," granted to one Francisco Estrada by the former Mexican Government of this country.

Plaintiff alleges that in the year 1862, and before the said grant was finally located, some parties claiming to own a part of said grant, brought an action of ejectment against him, the said plaintiff upon said grant title, and in said year of 1862 obtained a judgment in said action against him, and thereunder dispossessed him in said year of 1862 of and from a part and portion of his said pre-emption claim, said part and portion being the whole of the north half of the northeast quarter of said section one, excepting lot 3 as laid down on the amended plat hereinafter referred to, which said lot 3 contained 36-100 of an acre, and also being about 20 acres of the northeast quarter of the northwest quarter of said section one, said 20 acres of which he was so disposs'ed being lot 11, as laid down on said amended plat.

Plaintiff alleges that at the time he was so dispossessed of such lands, he had the whole thereof in possession and had improvements thereon of the value of $500.00, or thereabouts, consisting of a dwelling-house in which he then lived, fencing, well, and out-houses.

7 Plaintiff alleges that on the 28th day of June, 1865, the final official survey of the said grant "Pastoria de los Borregas," was finally fixed, settled, and confirmed by a decree of the circuit court of the United States of America for the State of California, on that day duly made and entered of record in said court, by which said final survey and decree the whole of said section one was finally and forever excluded from said grant, and has so ever since remained.

Plaintiff further alleges that afterwards, in or about the month of April, 1866, all the public lands of the United States of America in said township number seven south, range two west, Mount Diablo meridian, was surveyed by authority of the United States, and afterwards, to wit, on the 18th day of April, A. D. 1866, the official township plat of said township was duly returned by the surveyor-general of the United States of America for the State of California to the register of the United States land office at San Francisco, in the State of California, and the same was then and there received and filed by said register in his said office as an official plat of said township. And plaintiff alleges that the whole of said section one in said township was surveyed and laid down on said plat as public land of the United States of America.

8 Plaintiff alleges that afterwards, and within three months after the filing the said official township plat of said township seven, in said United States land office at San Francisco, viz, on or about the 16th day of July, 1866, he filed in the said United States land office at San Francisco his declaratory pre-emption statement numbered 2873

wherein and whereby he claimed the north half of the north half of said section one as a pre-emption right; a true and correct copy of which declaratory statement is hereunto attached, marked "Exhibit A," and made a part hereof.

Plaintiff further alleges that afterwards, to wit, on or about the 4th day of September, 1866, he made proof of his said pre emption claim and right under the laws of the United States of America, to the satisfaction of the register and receiver of the said United States land office at San Francisco, in the State of California, to the whole of the north half of the north half of said section one, and that he then and there took, made, and subscribed the pre-emption affidavit and oath of his said pre-emption right and claim prescribed for pre-emptors under the laws of the United States.

Plaintiff further alleges that immediately after he had proved his claim aforesaid, viz, on the 4th day of September, 1866, he applied to said
9 register and receiver to purchase and enter as a pre-emption right the whole of the north half of the north half of said section one, and that his said application was then and there duly accepted by said register and receiver, and that he immediately thereupon, as a pre-emptor of said pre-emption claim and right, made his entry of and payment in full for the whole of said land claimed by him as a pre-emption right as aforesaid, to wit, of the north half of the north half of said section one, and then and there received his duplicate certificate of purchase therefor from said receiver.

Plaintiff alleges that he has never abandoned his said purchase and payment, nor his said pre-emption right, nor any part thereof.

Plaintiff further alleges that afterwards, to wit, on or about the 4th day of May, 1867, the surveyor-general of the United States for the State of California, at the request of the defendant herein and others, but not at the request of plaintiff, filed in the United States land-office at San Francisco an amended plat of said section one, by which said amended plat the said north half of the north half of said section one was divided into several lots, two of which lots were numbered two and six;
10 that said lot two contains about 24 27-100 acres of land, and that said lot six contains about 29 65-100 acres of land, both of said lots containing in the aggregate about 53 92-100 acres of land; that both of said lots two and six were and are a part of the said north half of the north half of said section one.

Plaintiff alleges that on the said 24th day of May, 1867, the defendant filed in the United States land-office at San Francisco his application, which application was numbered 8 by the said register of said land office, in which application he claimed the right to purchase the whole of said lots two and six, under the seventh section of the act of Congress, approved July 23d, 1866, entitled "An act to quiet land titles in California," alleging that he had purchased said lots two and six in good faith from a Mexican grantee as a part of the said grant "Pastoria de los Borregas," hereinbefore mentioned.

Plaintiff alleges that afterwards such proceedings were had in the United States land office at San Francisco and in Washington, in pursuance of said application of defendant, that he said defendant was afterwards, to wit, sometime in the year 1871, allowed to make, and he did make, payment under his said application for the whole of
11 said lots two and six, and receive from the said receiver of the said United States land office at San Francisco a duplicate certificate of purchase therefor.

Plaintiff further alleges that afterwards, to wit, on or about the 5th

day of October, 1871, a patent for the whole of said lots two and six was issued by the United States of America to the defendant under his said purchase, which said patent plaintiff is informed and believes, and on such information and belief avers, has been delivered to and received by said defendant.

Plaintiff alleges that said lots two and six, so purchased by and patented to said defendant, constitute a portion and part of the land purchased by said plaintiff on the 4th of September, A. D. 1866, as hereinbefore alleged and set forth.

Plaintiff further alleges that defendant has and claims no other right, title, or interest in or to said lots two and six than that derived through his said application number 8, and his said purchase and patent which were derived through, under, and in pursuance of his said application number eight.

Plaintiff alleges that he has never at any time made any contract or agreement, either directly or indirectly, with any one, by which
12 the title he should acquire to his said pre-emption claim from the government or any part thereof should inure in whole or in part to any other person or persons whatever; and he further alleges that he has never at any time had the benefit of any pre-emption right under the laws of the United States other than as to the said north half of the said north half of said section one, as hereinbefore alleged and set forth.

Plaintiff alleges that he has continuously possessed, cultivated, and improved the whole of the north half of the north half of said section one, with the exception of the northwest quarter of the northwest quarter of said section one, and of the said portion included in said ejectment suit as hereinbefore set forth, since the month of October, 1856, to the present time.

Plaintiff alleges that from the month of October, 1856, he continuously possessed, cultivated, resided upon, and improved the said portion of his said pre-emption claim included in said ejectment suit until he was dispossessed thereof in 1862 as aforesaid.

Plaintiff alleges that he continuously resided upon, cultivated, possessed, and improved the said northwest quarter of the northwest quarter of said section one from the spring of 1863 to the present time.

13 Plaintiff alleges that from the month of October, 1856, till he was dispossessed of a portion of his said pre-emption claim in 1862, as aforesaid, he dwelt in a dwelling-house owned by him and situated upon the said portion of his said pre-emption claim included in said ejectment suit, and of which he was dispossessed as aforesaid; that being dispossessed therefrom as aforesaid, he, in the spring of 1863, moved into another dwelling-house then, and ever since, and now owned by him, and situated upon the northwest quarter of the northwest quarter of said section one; that he has ever since lived and dwelt in said dwelling-house last aforesaid, and on the said north half of the north half of said section one, and has ever since claimed and now claim' a pre-emption right to said north half of the north half of said section one under the laws of the United States, and has never abandoned any portion or part thereof; and then had, and ever since has had, and yet has valuable improvements thereon, consisting of said dwelling-house last aforesaid, fences, outhouses, &c., of the value of $1,000 or thereabouts.

Wherefore plaintiff prays for a decree and judgment of this court that defendant holds the legal title to said lots two and six of said section one in trust for said plaintiff, and that he be compelled to

14 convey the same to plaintiff, and that if he make default thereof for ten days after judgment, that the clerk of this court be appointed a commissioner for that purpose, and that plaintiff be adjudged and decreed to be the owner of said lots two and six, and that plaintiff recover his costs in this suit laid out and expended, and for such other order, judgment, or decree as may be just in the premises, and for general relief.

MOORE, LAINE & LEIB,
Att'ys for Plaintiff.

Complaint duly verified.

(Endorsed:) Filed December 9th, 1871. John M. Littlefield, cl'k, by L. F. Eastin, deputy.

EXHIBIT A.

No. 2872.—Declaratory statement of a settler on lands not subject to private entry at the date of settlement required by the 15th section of the act of 4th September, 1841.

I, Stephen D. Hosmer, of Santa Clara Co., being a citizen of the United States, over 21 years of age, and a single man, have, to wit, on the day of October, A. D. 1856, settled and improved the
15 N. ½ of N. E. ¼ and N. ½ of N. W. quarter of section number one in township number 7 south, of range number 2 west in the district of lands subject to sale at the land office at San Francisco, and containing 160 48-100 acres, which land was not subject to private entry at the passage of the act of 4th September, 1841, and I do hereby declare my intention to claim the said tract of land as a pre-emption right under the provisions of said act of 4th September, 1841, and 1853.

Given under my hand this 16th day of July, A. D. 1866.

STEPHEN D. HOSMER.

In presence of—

(Endorsed:) Filed July 16, 1866.

Answer.

(Title of court and cause.)

The defendant in the above-entitled action in his answer to the complaint of the plaintiff therein denies that said plaintiff ever settled upon that portion of the north half of section one (1), in township seven (7) south, range two (2) west from the Monte Diablo meridian, ac-
16 cording to the United States survey, which is now included in lots two (2) and six (6) of said section one since the month of February, 1862, or in either of them, or upon any part thereof; and says that said plaintiff never went upon any portion of the lands now included in said lots, or either of them, otherwise than as a mere trespasser.

Said defendant, further answering, upon his information and belief denies that said plaintiff ever had any improvements on said lots two and six, or on either of them.

Said defendant, further answering, says that at the time of said plaintiff's alleged settlement upon the land in said complaint described, to wit, the north half of the north half of section one, township seven

south, range two west, Mount Diablo meridian, and from thence until the month of April, A. D. 1866, none of said land was surveyed by the United States or open to pre-emption settlement under any statute of the United States.

Said defendant, further answering, says that said lots two and six in said complaint mentioned are contained in and form part of the north half of the northeast quarter of section one in said complaint mentioned, and said defendant denies that said plaintiff has at any time since the 29th day of May, A. D. 1862, settled upon, or inhabited,
17 or improved in any manner said north half of the northeast quarter of said section one, or any portion thereof, or had any house thereon, or cultivated any portion thereof. And said defendant says that said plaintiff has never since said twenty-ninth day of May, A. D. 1862, settled upon, inhabited, or improved said north half of said northeast quarter of said section, or any part thereof, nor had a house thereon, nor cultivated any portion thereof.

This defendant further says that before the United States of America had acquired the territory which now is included in the State of California, to wit, on the 15th day of January, A. D. 1842, Juan B. Alvarado, who was then and there governor of the department of the Californias under the Mexican government, as such governor duly granted to one Francisco Estrada a certain tract of land within said department commonly called and known as the "Rancho Pastoria de las Borregas," being two square leagues, a little more or less, to be located within certain exterior boundaries specified in said grant, within which exterior boundaries the land now known as said lots two (2) and six (6) was and is included; that afterwards and before the twenty-third day of July, A. D. 1856, a certain tract of land within said exterior boundaries, embracing
18 with other land that now included in said lots two and six, was by deed conveyed by said Francisco Estrada to one Mariano Castro, and that by sundry mesne conveyances the title to the land embraced in said lots two (2) and six (6), together with certain other land within the exterior boundaries of said grant, which was originally vested by said grant in said Francisco Estrada, passed to and vested in this defendant, prior to the final confirmation of the survey by the United States of said grant in said complaint mentioned and specified; that prior to said confirmation of said survey this defendant, in the year 1862, purchased of the assigns of said Francisco Estrada the land now included in said lots two (2) and six (6), with other land also within said exterior boundaries, in good faith and for a valuable consideration; that the land so purchased by this defendant, including said lots two (2) and six (6), was excluded from the final survey of said grant, which said survey was finally confirmed by the circuit court of the United States for the district of California, on the 28th day of June, A. D. 1865, as set forth in said complaint.

That ever since the date of his said purchase thereof, he, the said defendant, has used, improved, and continued in the actual possession
19 of the land so as aforesaid purchased by him, including said lots two (2) and six (6), as according to the lines of his original purchase.

That on the twenty-third day of July, A. D. 1866, no valid adverse right or title (except of the United States) existed to said land so as aforesaid purchased by him including said lots two (2) and six (6), or to any portion thereof.

That afterwards, to wit, in the month of March, A. D. 1867, at the instance of this defendant, a new survey of said section was made by the

United States, and on or about the fourth day of May, A. D. 1867, an amended and supplemental plat of said section one (1) based upon said new survey was made by the surveyor-general of the United States for the State of California, and filed in the United States land-office at San Francisco.

This defendant further says that on the 24th day of May, A. D. 1867, he, the said defendant, filed in the said U. S. land-office at San Francisco his application to purchase under the seventh section of the act of Congress entitled "An act to quiet land titles in California," approved July 23rd, 1866, said lots two and six, with other land, being the land so as aforesaid purchased by him from the assigns of said Francisco Estrada, Mexican grantee as aforesaid.

20 That after the entry of and payment for the north half of the north half of said section one (1), in said complaint mentioned by said plaintiff, to wit, on the thirteenth day of December, A. D. 1866, the then Commissioner of the United States General Land Office was informed of the claim of this defendant to purchase from the United States said land so as aforesaid purchased by him from the assigns of said Mexican grantee, and of the entry of and payment for said north half of the north half of said section one (1) by said plaintiff.

That said Commissioner thereupon, to wit, on said thirteenth day of December, A. D. 1866, in the exercise of his power of supervision and control of the executive duties prescribed by law appertaining to the sale of the public lands of the United States, and respecting such public lands, remanded the said entry and purchase made by said plaintiff back to the U. S. land-office at San Francisco for reinvestigation, and directed the said register and receiver of the United States land-office at San Francisco to take such testimony as might be offered by said plaintiff and by said defendant concerning their respective claims to purchase the land so as aforesaid included in plaintiff's entry claimed by defend-

ant, to wit, that embraced in lots two (2) and six (6) in said sec-
21 tion, and to report the same with their decision thereupon to said Commissioner.

That thereupon, and in obedience to a summons from the register and receiver, said plaintiff and defendant afterwards, to wit, in the year 1867, appeared before said register and receiver and severally offered testimony in support of their respective claims to purchase from the United States said lots two and six; that this defendant then and there made proof of the facts aforesaid, as required in said seventh section, under regulations provided by said Commissioner of the General Land Office of the United States, and by consent of both said parties the cause was in said year submitted to said register and receiver upon the testimony so offered.

That afterwards, to wit, in the month of , A. D. 1867, said register and receiver decided in favor of the application of said plaintiff and against the application of this defendant.

That this defendant thereupon appealed to the Commissioner of the General Land Office of the United States from the said decision of said register and receiver, and that afterwards, to wit, on the twenty-fourth day of May, A. D. 1869, said Commissioner reversed said decision of

said register and receiver, and decided in favor of the ap-
22 plication of this defendant and against the application of said plaintiff, so far as the same related to lands included in the application of said defendant.

That thereupon said plaintiff appealed from said decision of said Commissioner to the Secretary of the Interior of the United States, and that

upon said appeal said decision of said Commissioner was sustained by said Secretary, and said register and receiver were directed by said Commissioner and Secretary to carry out said decision of said Commissioner, and to allow said defendant to enter the land so applied for by him.

That thereupon said defendant paid the receiver of public moneys of the United States for the land district of San Francisco for the land so applied for by him, being lots two (2), four (4), six (6), and nine (9), in said section one (1), at the rate or price of one dollar and twenty-five cents per acre, and received from said receiver a duplicate receipt for the money so paid for said land by him; and that thereupon such proceedings were had that on or about the 5th day of October, A. D. 1871, a patent from the United States for all the land so applied for and purchased by him from the United States, being 74.82 acres, was issued and delivered to him, the said defendant.

23 And said defendant further says that by virtue of the facts hereinbefore set forth, and of the provisions of the seventh section of said act of Congress approved July 23d, 1866, he, the said defendant, was lawfully entitled to purchase said land from the United States as aforesaid at the minimum price prescribed by law; and that by virtue of said purchase, and of said patent, he holds said land for his own use and benefit, free from any and every trust whatever.

This defendant further says that he is the successor in interest of the plaintiffs in the action of ejectment in said complaint mentioned as to the said grant-title to said lots two (2) and six (6), and that he has obtained and deraigns his said title under said Mexican grant to said lots two and six through said plaintiff in said action of ejectment; that the title to said lots two (2) and six (6), held by said plaintiffs at the commencement of said action, has been conveyed to and is now vested in this defendant; and that said plaintiff is, by the judgment in said action, estopped to deny that the plaintiffs therein had, at the commencement of said action, or that this defendant has now, the right of possession and the ownership of the land in said lots two (2) and six (6).

24 Said defendant further says that said plaintiff was dispossessed of the north half of the northeast quarter of section one aforesaid, as set forth in said complaint, before the 30th day of May, 1862, to wit, in the month of February, 1862; and that said plaintiff has never since such dispossession settled upon, inhabited, improved, or had or erected a house upon said north half of said northeast quarter of said section one, or any part thereof.

This defendant further denies, upon his information and belief, that at the time of plaintiff's being dispossessed of the north half of the northeast quarter of section one (1), mentioned and set forth in said complaint, he, the said plaintiff, had the whole thereof in possession.

Wherefore said defendant prays judgment against said plaintiff for the costs of this action.

GEO. A. NOURSE,
Att'y for Defendant.

Answer duly verified.

(Endorsed:) Filed May 13th, 1872. C. Finley, clerk, by Leo Watkins, deputy.

Findings.

(Title of court and cause.)

Bill in equity, to declare a U. S. patent for land held by defendant to be by him held in trust for plaintiff.

25 Finding of fact and judgment of court.

From the pleadings, stipulation, and testimony offered in this case, I find the following facts in connection with those admitted by the pleadings:

First. The plaintiff in said action in October, 1856, settled upon and improved, and built a house upon the north half of the northeast quarter of section one (1), in township seven (7) south, range two (2) west, Mount Diablo meridian, with other land, as alleged in the complaint.

Second. Said plaintiff continued to inhabit and improve the whole of the said north half of said quarter section until the eleventh day of February, 1862, when he was removed from that portion of the same afterwards patented by the United States to the defendant, as alleged in the complaint, by the sheriff of Santa Clara County, under a writ of restitution in an action of ejectment, in which action Daniel Lyons was plaintiff and the plaintiff in this action was one of the defendants. Said Daniel Lyons then claiming title to said premises sued for by him under the Spanish or Mexican grant mentioned in the complaint in this action, and none other. The defendant herein purchased the title of said Lyons to said tract before July 23d, 1866, and still holds the same.

26 Thirdly. In said action of ejectment said Lyons claimed said portion of north half of the northeast quarter of said section from which plaintiff was ejected as aforesaid, under the general title mentioned in the complaint and answer herein; and afterward, and before July 23d, 1866, said Lyons conveyed his said grant-claim to lots (2), four (4), five (5), and six (6), in said section, to the defendant in this action, who held the possession of these said lots at the time of the passage of the act of Congress entitled "An act to quiet land titles in California," approved July 23d, 1866, and up to the issuing of the patent mentioned in the pleadings in this action.

Fourthly. Said plaintiff has never inhabited, cultivated, or improved said north half of the northeast quarter of said section one, nor any part thereof, since his said removal therefrom, in February, A. D. 1862, but has ever since that time resided on the north half of the northwest quarter of said section one.

Fifthly. The said north half of the northeast quarter of said section one was within the exterior boundaries of the rancho "Pastoria de los Borregas" mentioned in the pleadings herein, which rancho was granted to Francisco Estrada by the Mexican authorities before the acquisition of California by the United States. Said grant was duly confirmed to the grantees of said Estrada for a less quantity of land than was

27 contained in the exterior boundaries, and the survey thereof, according to the present boundaries, excluding from the grant the north half of the northeast ¼ of said section one, was finally affirmed by the United States circuit court June 25th, 1865. Patent for said grant as finally surveyed was issued December 15th, 1865.

Sixthly. Prior to said final survey of said grant, Francisco Estrada, the grantee, conveyed to said Mariano Castro his right and claim to a portion of the land included within its exterior boundaries, including

the north half of the northeast quarter of said section, and by sundry mesne conveyances the right, title, and claim of the said Estrada to the lots in dispute in this action vested in the defendant before said final survey.

Seventhly. Prior to the confirmation of said final survey defendant herein purchased from the grantees of said Estrada their right and claim, for a valuable consideration, to the land, with other land within said exterior boundaries of said grant, embraced in lots two and six named in the complaint herein, and from the 11th day of February, 1862, up to and even since July 23d, 1866, has by his tenant used and continued in the actual possession of the same, as according to the lines of his original purchase, but he has never in person been in possession of the same, nor improved it.

28 Eighthly. On the 23d day of July, 1866, the whole of section one aforesaid was a part and portion of the unsold public land of the United States.

Ninthly. December 13th, 1866, the then Commissioner of the United States Land Office, upon information of the claim of defendant to enter the land now in lots two (2) and six (6), ordered and directed the register and receiver at San Francisco to investigate the entry and purchase of the north half of the north half of the said section one, made by plaintiff, as alleged in the complaint, and directed said register and receiver to take such testimony as might be offered by said plaintiff and said defendant, respectively, concerning their respective claims to said lots two (2) and six (6), and to report the same with their decision thereon to said Commissioner.

Tenthly. That thereupon said plaintiff and defendant appeared before said register and receiver, in obedience to a summons from them, and during the year 1867 offered testimony in support of their respective claims to said land.

That said register and receiver decided said cause in favor of said plaintiff and against said defendant.

That defendant appealed to the Commissioner of the General Land Office from said decision, and that the same was reversed by said

29 Commissioner, who awarded to the def't the said lots two and six, and directed that he be allowed to purchase the same.

That the plaintiff appealed to the Secretary of the Interior from the Commissioner's decision, and that he, the said Secretary, affirmed the same, and directed the register and receiver to carry out the said decision of said Commissioner. That thereupon, in obedience to said order, said defendant paid to said register for said land the minimum price established by law, to wit, $1.25 per acre, and received from said register a duplicate receipt for the money so paid; that afterward and before the commencement of this suit, a patent for said lots two and six was issued to defendant, under which he now holds said lots.

Eleventh. That said section one, in said complaint mentioned, was never surveyed by the United States until the year 1865, as alleged in the plaintiff's complaint.

Twelfth. The whole of said section one is agricultural and not mineral land, and there never was any military post thereon nor within ten miles thereof.

Thirteenth. That the plaintiff did, after his eviction from this lot in February, 1862, remove from said north half of the northeast quarter of section one all his houses and out buildings, and so far as was

30 practicable employed the materials in the construction of buildings and fences upon other and adjacent lands.

Fourteenth. That the plaintiff settled upon this land in 1856, and occupied it until his eviction in February, 1862. That he intended to hold it as a pre-emption, and that he has never abandoned or relinquished that intention.

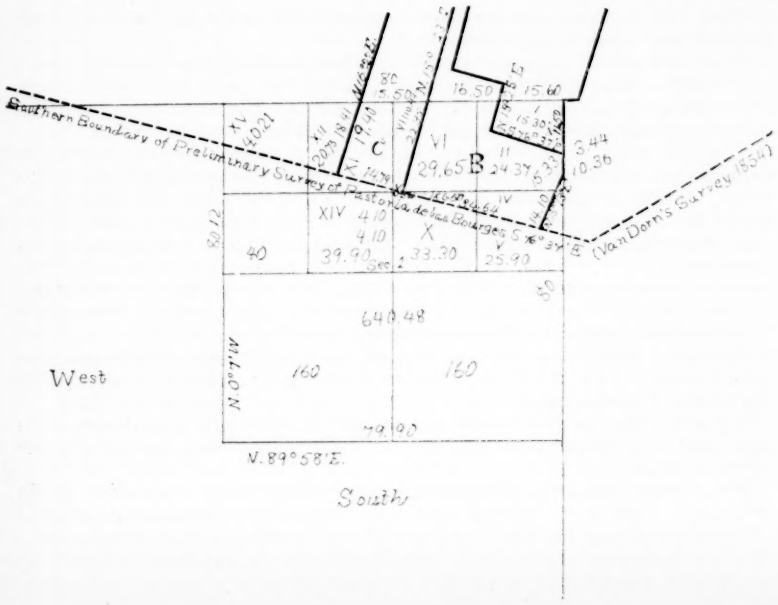
Fifteenth. That the defendant had received his U. S. patent for this land before the commencement of this suit.

Sixteenth. That the defendant, W. T. Wallace, after the final confirmation of this grant, but before the final survey, in good faith and for a valuable consideration, equal to the then cash value of the land, purchased said land from the grantees of said Spanish grant. That this purchase was made by Wallace in good faith, and in the full confidence and belief upon his part that by said purchase he was securing the absolute title in fee simple to said land.

Seventeenth. The diagram hereunto attached, marked "Exhibit 1," is a correct diagram of section one mentioned in the complaint, shows correctly the lines of the official survey as delineated in the township plat originally filed, and also the lines of the tract claimed by the defendant Wallace under his grant-claim and purchase, said last-named tract being indicated in yellow.

30½ HOSMER *vs.* WALLACE.

Plot of sec. 1 *in T.* 7 *S., R.* 2 *W., of Mount Diablo meridian, as amended from field notes of survey made under instructions from the U. S. surveyor general, dated February* 13*th*, 1867, *as issued under the act of Congress approved July* 22*rd*, 1866, *by Charles T. Healy, deputy surveyor, March*, 1867.



EXPLANATION.

A, part of tract of land purchased by W. T. Wallace from C. T. Ryland.
B, " " " " " " " " Daniel Lyons.
C, " " " " " Daniel Lyons " C. T. Lyons.

A full, true, and correct copy of section 1 in township No. 7 south, range No. 2 west, of Mount Diablo meridian, as amended, on file in this office.

L. UPSON,
Surv. Gen. Cala.

Surveyor general's office, San Francisco, California, May 3rd, 1867.

Filed May 4, '67.

J. W. SHANKLIN,
Register.

A full, true, and correct copy of the original plat now on file in this office.

U. S. Land Office, San Francisco, Cala., Nov. 8, 1871.
[SEAL OF LAND OFFICE.] H. G. ROLLINS,
Register.

Exhibit 1.

31 These are the material facts of the case:

Plaintiff contends that the decision of the register and receiver in his favor was conclusive, and that no appeal lay to the commissioner and secretary. I am of opinion that an appeal did lie. The case of Johnson vs. Towsley, Supreme Court U. S., not yet reported, would seem to settle that point. And without this decision, I should hesitate to find that an appeal did not lie, when it has been so long and extensively exercised, and in matters of such large interest.

The case from 2 Iowa, cited by plaintiff, distinctly admits that by the act of 1874 an appeal was allowed to the Commissioner and Secretary.

The right of appeal admitted, its effect cannot be questioned.

The same authority that empowered the receiver to act authorized the Commissioner and Secretary to review and reverse. Its final action is the action of the department, and that is for the defendant, and through it he has his patent.

The plaintiff, however, contends that he has equities that will control the effect of the patent. The action of the Commissioner and the Secretary reversing the action of the register left the plaintiff with nothing but his possession, his prior occupancy of the public land upon
32 which to rely. He was there by sufferance, to be tolerated or removed at the option of the paramount owner, the government.

With this his position July 23, 1866, Congress, by an act designed to give to parties occupying the position which these facts assign to defendant, gave defendant a special and preferred right or privilege to purchase the land he had purchased in good faith from a Spanish grantee. That Congress could do this, that it controls absolutely the public domain while it remains such, that it can absolutely ignore and disregard all mere equities that might exist between individuals or that may present themselves as against the government, has been often held and is now firmly established. For the individual to resist this absolute power of disposition by the paramount proprietor, his claim must rise above a

mere equity, it must have matured into a right, and present itself with at least some of the attributes of a contract. It is not then what the government ought to do, but what it has done, that concludes itself and its officers in every department. When this is the position of the claimant, a higher power than Congressional legislation secures his right, and the government, whose concession has attained the dignity of a con-
33 tract, cannot in any way recall or restrict its grant or its gift from the recipient of its bounty; but until this is done, it may control and dispose of the public lands at its pleasure. The equities it may override may entitle the sufferer to recognition or reimbursement from some other source, but against the act and donation of Congress they cannot be heard in the courts.

However ruthless the act, it as effectually extinguishes the equity of the individual as though it had never existed.

What is the contract that will prevent such legislation and enable the holder to resist such a donation? The lowest act of recognition that will accomplish this result is the payment of the purchase-money and receiving the certificate of purchase; less than this will not avail. If in the present case this had been done, had the register and receiver received the money and issued the certificate, the repeal and reversal did away with all the effect of that transaction, and left the plaintiff with nothing but his former possession to resist a United States patent and a special act of Congress. This he cannot do. The numerous decisions in the case of the Suscal Rancho in the Supreme Court of the United States and of this State are conclusive upon this point.
34 Plaintiff's bill is denied, and defendant has judgment for his costs.

D. BELDEN,
Dist. Judge.

(Endorsed:) Filed June 3d, 1872. C. Finley, clerk, by M. H. Gay, deputy.

Judgment.

(Title of court and cause.)

MAY TERM, A. D. 1872.

This cause came on regularly for trial, Mess'rs Moore, Laine & Leib appearing as counsel for the plaintiff and Geo. A. Nourse, esq., for the defendant. A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried before the court sitting without a jury, whereupon witnesses on the part of plaintiff and defendant were sworn and examined, and the evidence being closed, the cause was submitted to the court for consideration and decision; and after due deliberation thereon, the court delivers its finding and decision in writing in favor of defendant, and orders that judgment be entered in accordance therewith.
35 Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged, and decreed that plaintiff take nothing by his action, and that defendant do have and recover from plaintiff his costs and disbursements incurred in this action, amounting to the sum of $23.25.

Judgment rendered June 3d, A. D. 1872.

C. FINLEY, *Clerk*,
By LEO WATKINS, *Dep.*

Notice of appeal.

(Title of court and cause.)

To the clerk of the above-named court, the defendant, W. T. Wallace, and George A. Nourse, defendant's attorney:

You and each of you will please take notice that the plaintiff in this action hereby appeals to the supreme court of the State of California from the judgment of the court in this action in favor of the defendant and against the plaintiff, and from the whole and every part thereof; which said judgment was made and entered on or about the 3d day of June, A. D. 1872.

San José, June 5th, 1872.

MOORE, LAINE AND LEIB,
Atty's for Plaintiff and Appellant.

(Endorsed:) Filed June 5th, 1872. C. Finley, clerk, by M. H. Gay, deputy.

36 *Acceptance of service of notice of appeal and waiver of undertaking.*

(Title of court and cause.)

Due and legal service of the notice of appeal filed in this cause on the 5th day of June, 1872, is hereby admitted, and the respondent hereby expressly waives the filing and giving of any undertaking on appeal in this case by the appellant, and consents that said appeal may be heard and determined with like effect as if an undertaking on appeal had been duly given, the object being to lessen the costs on appeal, and the respondent hereby consents that this acceptance of service and waiver of undertaking may be attached to the notice of appeal by the clerk of the court and considered and taken as endorsed on said original notice of appeal.

San Francisco, June 6th, 1872.

GEO. A. NOURSE,
Attorney for Defendant and Respondent.

(Endorsed:) Filed June 7th, 1872. C. Finley, clerk, by Leo Watkins, deputy.

37 *Certificate of transcript.*

STEPHEN D. HOSMER, PLAINTIFF AND APPELLANT,
vs.
W. T. WALLACE, DEFENDANT AND RESPONDENT.

I, Cornelius Finley, county clerk of the county of Santa Clara, and ex officio clerk of the district court of the twentieth judicial district of the State of California in and for said county, do hereby certify the foregoing printed transcript on appeal to be correct; and that the map, papers, and orders therein contained are true, full, and correct copies of their originals now on file and of record in said court in said cause.

And I further certify that the undertaking on appeal in the within-entitled cause was by stipulation of the respondent, expressly waived.

In witness whereof I have hereunto set my hand this 2d day of July, A. D. 1872.

[SEAL.]

C. FINLEY, *Clerk*,
By EDGAR POMEROY,
Deputy Clerk.

38 STATE OF CALIFORNIA,
County of Santa Clara, ss:

S. F. Leib, being first duly sworn on his oath, states that he is one of the attorneys for the plaintiff in this action; that there is a regular daily communication by mail between the city of San José, in said county and State, and the city and county of San Francisco, in said State; that all the attorneys for the said plaintiff reside in said Santa Clara County, and the attorney for the defendant resides in said city of San Francisco; that this deponent served this transcript on said att'y for def't by depositing a copy thereof in the United States post-office, at said city of San José, on the 10th day of July, A. D. 1872, addressed to him as following, "George H. Nourse, att'y at law, San Francisco, California," with the postage prepaid thereon.

S. F. LEIB.

Subscribed and sworn to before me this 12th day of July, 1872.

[SEAL.]

JA'S R. LOWE, J'R,
Notary Public.

39 In the supreme court of the State of California. January term, A. D. 1874.

STEPHEN D. HOSMER, APPELLANT,
vs.
WILLIAM T. WALLACE, RESPONDENT. } No. 3430.

On appeal from the district court of the 3d judicial district in and for the county of Santa Clara.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Crockett, J., Niles, J., & McKinstry, J., concurring, to the effect that the judgment of the court below be affirmed.

Whereupon it is now considered, ordered, adjudged, and decreed by the court here that the judgment of the district court of the 3d judicial district in and for the county of Santa Clara in the above-entitled cause, be, and the same is hereby, affirmed with costs.

I, D. B. Wolf, clerk of the supreme court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the twenty-fifth day of February, A. D. 1874, and now remaining of record in my office.

Witness my hand and the seal of the court affixed at my office this 27th day of July, A. D. 1876.

[SEAL.]

D. B. WOOLF, *Clerk*,
By H. P. BUSH, *Deputy.*

(Indorsed:) No. . In the supreme court State of California.
Remittitur.

40 *Opinion.*

In the supreme court of the State of California.

HOSMER *vs.* WALLACE. } No. 3430

The plaintiff appeals on the judgment roll alone from a judgment in favor of the defendant, and the only question before us is, whether on the pleadings and findings the plaintiff is entitled to the relief demanded. The principal question in the case is, whether on the facts admitted by the pleadings or found by the court the action of the register & receiver, in permitting the plaintiff's entry & accepting the purchase price, was subject to the revision & control of the Commissioner of the General Land Office and the Secretary of the Interior. It appears from the findings that after the plaintiff had proved up his pre-emption claim, and had paid the purchase money and obtained his certificate, the Commissioner of the General Land Office, upon receiving "information of the claim of defendant to enter the land, now in lots two and six, ordered and directed the register and receiver at San Francisco to investigate the entry and purchase of the north half of the north half of the said section one, made by the plaintiff, as alleged in the complaint, and directed said register and receiver to take such testimony as might be offered by said plaintiff and said defendant respectively concerning their respective claims to said lots two and six, and to report the same with their decision thereon to said Commissioner." It further appears that in pursuance of this instruction notice was given to the plaintiff and defendant, who appeared before the register and receiver
41 and litigated their respective rights. The decision of the register and receiver was in favor of the plaintiff, from which the defendant appealed to the Commissioner of the General Land Office, by whom the decision of the register and receiver was reversed and the land awarded to the defendant. From this decision the plaintiff appealed to the Secretary of the Interior, who affirmed the ruling of the Commissioner; and on the return of the case to the register and receiver, the defendant paid the purchase price and received a duplicate receipt therefor; whereupon a patent issued to him, under which he now holds the land. The plaintiff claims that the patent wrongfully issued to the defendant, and ought rightfully have issued to the plaintiff, and the object of the present action is to compel a conveyance of the legal title.

The plaintiff claims the land as a pre-emptioner and the defendant under the act of Congress of July 23, 1866, entitled "An act to quiet titles in California." The plaintiff filed his declaratory statement of his intention to pre-empt the land a few days before the act of Congress of July 23, 1866, but did not prove up his claim and pay the purchase price until several months later. It becomes material, therefore, to enquire, 1st, whether, on the facts admitted by the pleadings or contained in the findings, the Commissioner of the General Land Office and the Secretary of the Interior had jurisdiction to set aside the decision of the register and receiver awarding the land to the plaintiff; and, if this question be answered in the affirmative, 2d, whether their action
42 in the premises can be reviewed in the courts, in the absence of an allegation of fraud, accident, or a mistake of facts induced by false affidavits or fraudulent practices. If the action of the register and receiver, in permitting the plaintiff's entry and accepting payment of

the purchase-money, was subject to be reviewed and set aside by the Commissioner of the General Land Office, or, on appeal by the Secretary of the Interior, then it is plain that the plaintiff has no title which a court of equity will enforce, unless the action of these officers can be reviewed on some ground of equitable cognizance to be alleged and proved. They have decided his case against him; and if they had jurisdiction of the proceeding, and were empowered by law to decide the controversy, their decision concludes the plaintiff, unless it can be impeached on some of the grounds on which courts of equity interfere to correct errors of law, to prevent fraud, or to correct mistakes superinduced by false representations or fraudulent practices.

On the question of jurisdiction, it may be observed, in limine, that, under the land system of the United States, the Commissioner of the General Land Office, subject to the supervision of the Secretary of the Interior, is at the head of the department having in charge the sale and disposal of the public lands. He is authorized to make rules and regulations not inconsistent with law for the government of the numerous subordinate officers dispersed over a vast territory, and many of them at remote points from the seat of government. The interests confided to this branch of the public service are of great magnitude, affecting both public and private rights, and the trusts reposed in subor-
43 dinate officers are capable of gross abuses. Under these circumstances it is not a reasonable inference that Congress intended the decision of the register and receiver to be absolutely final in any matter pertaining to the sale of public lands. Before permitting the entry of a pre-emption claimant they are required to take certain proofs touching the qualification of the applicant and the acts he has performed to entitle him to purchase the land. On the theory of the plaintiff, if they should make a mistake, however gross in these respects, and award the land to a claimant clearly not entitled to it for lack of the necessary qualification, or because of his failure to perform the requisite conditions, the Commissioner of the General Land Office would be wholly powerless to apply the proper remedy, by setting aside the entry and returning the purchase money, unless there should be an adverse claimant who brought up the case on appeal. But if there were no adverse claimant, it is contended the decision of the register and receiver would be absolutely final, and that, on paying the purchase money and obtaining his duplicate receipt, the claimant would thereby acquire an equitable title, which the Commissioner of the General Land Office or the Secretary of the Interior would be powerless to divest by setting aside the entry, however clearly it might appear that the claimant was not entitled to the land. If the local officers were subject to no supervisory control in this respect, it is easy to see that the opportunities for fraudulent entries would be greatly multiplied, and that the land system would be capable of gross abuses. It was, doubtless, in view of this fact, and to promote uniformity in the administration of the
44 laws for the sale of the public domain, that Congress, by the act of July 4, 1836, entitled "An act to reorganize the General Land Office," enacted "that from and after the passage of this act the executive duties now prescribed, or which may hereafter be prescribed by law, appertaining to the survey and sale of the public lands of the United States, or in anywise respecting such public lands, and also such as relate to private claims of land and the issuing of patents for all grants of land under the authority of the Government of the United States, shall be subject to the supervision and control of the Commis-

sioner of the General Land Office under the direction of the President of the United States."

This language is so explicit as to need no interpretation. If all the executive duties appertaining to the "sale of the public lands of the United States, or in anywise respecting such public lands," are to be "subject to the supervision and control of the Commissioner of the General Land Office," it is impossible to escape the conclusion that the acts of the register and receiver, in permitting an entry of a parcel of public land by a pre-emptioner, are subject to the "supervision and control" of the Commissioner, whether the matter be brought to his attention by appeal or otherwise. His duty to supervise and "control" the acts of his subordinates is not made to depend upon the accidental circumstance whether there be adverse claimants of the land. If his authority was thus limited, it would open the door to numerous frauds, and in a large class of cases there would be no means of correcting the mistakes and blunders of incapable local officers. We are supported in these views by the late case of Johnson v. Towsley, 13 Wallace, 72.

We are, therefore, of opinion that the Commissioner of the General Land Office and the Secretary of the Interior on appeal had the
45 jurisdiction to "control" the action of the register and receiver in permitting the plaintiff's entry, and had lawful authority to set it aside if erroneous.

It remains to be considered to what extent the action of these officers may be reviewed in the courts. It is a rule resting on reason, and authority as well, that, in the absence of fraud or fraudulent impositions on the officers of the Land Department, their determination of matters of fact is not open to review in the courts. Being a special tribunal to which the law confides the duty of deciding upon facts which are brought in question before them, their decision, if free from fraud and not the result of a fraudulent imposition upon them, is final and conclusive. They may err in their judgment as to the weight of testimony or may decide directly against the evidence. But no appeal to the courts lies to correct such errors (Johnson v. Towsley supra). If every disappointed applicant for the purchase of a quarter section of land could appeal from the decison of the Land Department to the courts on controverted questions of fact, the delays would be most vexatious and the litigation interminable. But these officers are not above the law, which prescribes a rule of conduct for them, and to which their official acts, like those of all other executive officers, are subject. If, on an admitted state of facts, they perform an act not authorized by law, the courts will redress the wrong, or apply the proper corrective. The courts have frequently exercised jurisdiction in such cases, and have reversed the action of the Land Department in awarding the land to one person when the law awarded it to another; and that, too, in the absence of any charge of fraud or imposition.

In entertaining jurisdiction in that class of cases, courts of equity
46 proceed on the principle that the Land Department is not an imperium in imperio, whose decisions of purely legal questions are absolutely final, but, on the contrary, that when the controversy involves no disputed question of fact, which it is the peculiar province of that department to decide, the courts, in proper cases, will correct its erroneous rulings on questions of law.

But in the case at bar it does not appear, either from the pleadings or findings, what facts were proved before the register and receiver; the only averment in the complaint on this point being "that he made proof of his said pre emption claim and right under the laws of the

United States of America to the satisfaction of the register and receiver of the United States Land Office," &c. The decision of the register and receiver, however, was not satisfactory to the Commissioner of the General Land Office, who ordered them "to investigate the entry and purchase of the north half of the north half of the said section one, made by the plaintiff," and directed them to take such testimony as might be offered by the plaintiff and defendant respectively, and to report the same, with their decision thereon, to the Commissioner. The testimony was accordingly taken, but it does not appear what facts were proved on this second investigation. The decision of the register and receiver being again in favor of plaintiff, was again disapproved by the Commissioner in respect to the land in controversy, and his decision was affirmed on appeal by the Secretary of the Interior. For aught that appears in this record, the decision of the two highest officers of the Land Department at Washington in rejecting the plaintiff's claim may have turned wholly upon the question of the sufficiency or insuf-
47 ficiency of his proofs to entitle him to pre-empt the land under the general pre-emption laws. The proofs are not before us; and if they were, it is the exclusive province of the Land Department to decide upon the sufficiency or insufficiency of the evidence to establish the necessary facts. Nor do the pleadings or express findings negative the inference that, in the opinion and judgment of the Commissioner and the Secretary, the plaintiff's proofs were insufficient to establish his claim under the general pre-emption law. The only facts found or admitted by the pleadings on this branch of the case are that the plaintiff made proof of his claim to the satisfaction of the register and receiver, and that the Commissioner, on receiving information of the defendant's claim, ordered a reinvestigation of the plaintiff's claim, whereupon new proofs were taken and another decision rendered by the register and receiver in favor of the plaintiff, which was reversed by the Commissioner and secretary, by whom the land was awarded to the defendant. There is nothing in the record to rebut the inference that the decision of these officers may have proceeded wholly on the ground that in their judgment the plaintiff's proofs were not sufficient to establish the performance of the necessary acts to entitle him to the benefit of the general pre-emption laws. In order to present a case of which a court of equity would take cognizance, it ought distinctly to have appeared that the Commissioner was mistaken, not in the facts, but in the law of the case.

As we have already seen, his judgment on the facts cannot be reviewed in the courts, in the absence of fraud or imposition, whilst his de-
48 cision of questions of law may be. The pleadings and finding fail to show that the error, if there be one, of the Commissioner and Secretary was not purely an error of fact and not of law.

Judgment affirmed.

Remittitur forthwith.

CROCKETT, J.

We concur.

NILES, J.

MCKINSTRY, J.

The chief justice being a party to the action, did not sit in the cause.

(Indorsed:) Filed February 25th, 1874. Grant I. Taggart, clerk, by Allen Tillinghast, deputy.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct

copy of the opinion filed in the above-entitled cause on the 25th day of February, A. D. 1874, as shown by the records of my office.

Witness my hand and the seal of the court this 19th day of July, A. D. 1876.

[SEAL.]

D. B. WOOLF, *Clerk*,
By H. P. BUSH, *Deputy*.

49 *Dissenting opinion.*

In the supreme court of the State of California.

HOSMER *vs.* WALLACE. } No. 3430.

The proposition upon which the judgment for the defendant is affirmed by my associates is that the decision of the proper officers of the Land Department, upon an application of a pre-emption claimant to enter lands, is subject to review by the courts if it turned upon a question of law; or, in the language of the prevailing opinion, "that when the controversy involves no disputed question of fact, which it is the peculiar province of that department to decide, the courts in proper cases will correct its erroneous rulings on questions of law"; but that, if the decision turned upon questions of fact, the courts will not review it unless fraud be shown. This proposition accords with the language of the opinion in Johnson v. Towsley, 13 Wallace, 72; but whether that point was involved in that case it is unnecessary here to enquire. In the opinion in this case it is said that it does not appear what facts were proved before the register and receiver on either investigation; that for ought that appears in the case, the decision of the Commissioner and the Secretary of the Interior may have turned wholly upon the question of the sufficiency of the evidence; that it is to be inferred that their decision proceeded on that ground, and that there is nothing in the case to rebut that inference.

The pleadings admit that the plaintiff possessed the requisite qualifications of a pre emptor; that in 1856 he was residing on the
50 north half of the north half of section one of township seven south of range two west, claiming the right of pre-emption to the whole of the same, and so continued up to some time in 1862, when the defendant's predecessor, who claimed title under the grant of the rancho Pastoria de las Borregas, obtained a judgment against the plaintiff, and thereunder dispossessed him of the premises in controversy (they being portions of the north half of the northeast quarter of said section); that the plaintiff in 1863 moved into a dwelling-house owned by him on the north half of the northwest quarter of said section, and has since continued to reside in the same; that the survey of the said rancho was finally confirmed in June, 1865, whereby the whole of said section was excluded therefrom; that on the 18th day of April, 1866, the official plat of the survey of the township which includes said section one was returned to the office of the register of the proper land office; that the plaintiff, on the 16th day of July, 1866, filed in that land office his declaratory statement, claiming the north half of the north half of that section; that on or about September 4th, 1866, "he made proof of his said pre-emption claim and right under the laws of the United States of America to the satisfaction of the register and receiver of the United States land office at San Francisco, in the State of California, to the whole of the north half of the north half of said section one," and that

his application was accepted, and on the 4th day of September, 1866, he entered said land.

The averment that "he made proof of his said pre-emption
51 claim and right" means, when read in connection with the allegations of the complaint which precede it, that he proved by competent and satisfactory evidence the facts upon which his claim and right rested: the facts stated in the complaint as the basis of his claim and right of pre-emption. That this is the construction to be placed upon that averment there is in my opinion no room for doubt or question.

There is not a single fact in the record which conflicts with those upon which the plaintiff's claim to the right of pre-emption rests. The defendant asserted the right of pre-emption under the seventh section of the act of Congress of July 23, 1866 (14 U. S. Stat's at Large, 218), which grants the right of pre-emption to those who had in good faith and for a valuable consideration purchased from Mexican grantees or their assigns lands which were afterwards excluded from the survey of the grant, etc. There is no fact in the defendant's line of proof, either averred in the answer or recited in the findings, which is inconsistent with the facts alleged by the plaintiff as the basis of his claim and right; nor does it appear from the record, either expressly or by inference, that any fact existed or was proven in the contest before the officers of the Land Department, which overcome or even impaired the force and effect of the facts upon which the plaintiff relied. It is a significant fact in this connection that the Land Department did not set aside and cancel the approval of the plaintiff's claim and the entry as to the whole of the land included in his pre-emption claim, but only as to a portion of it—that portion which is now in controversy.

52 The plaintiff's right under the pre-emption laws to each and every parcel of the lands within his claim rested on one and the same state of facts. His right under those laws to the north half of the northeast quarter of the section was the same, and depended on the same facts, as to the north half of the northwest quarter. The approval of his claim and his entry of the north half of the northwest quarter, and of all of the north half of the northeast quarter, except that which was allotted to the defendant, lead irresistibly to the inference, I think, that the plaintiff's claim to the whole of the north half of the northeast quarter would have been sustained and approved had it not been for the defendant's claim under the special act of July 23d, 1866. If the defendant's claim under that act was valid and entitled to approval, except for the claim of the plaintiff under the general pre-emption laws, it is equally clear that the claim of the latter was also valid and entitled to approval, and would have been allowed to stand as approved had not the defendant's claim been presented. There is, therefore, no room for the inference that the proofs of the plaintiff's claim and right were not satisfactory to the officers of the Land Department, but the inference is clearly deducible from the facts presented by the record before us that the decision of the Land Department turned upon questions of law; that the determination was that upon the facts established in the contest the act of July 23, 1866, gave the defendant the better right to purchase the land. If such were the case, the determination of the Land Department is subject to review by the courts.

53 I will only add that, upon the facts presented by the pleadings and findings, there can be no question that under the general pre-emption laws and the act of July 23d, 1866, the plaintiff's claim to the whole of the north half of the north half of the section should have been

approved, and that his entry should not have been cancelled as to the lands in controversy; and I am of the opinion that the court below should have rendered judgment, on the findings, for the plaintiff.

RHODES, J.

(Indorsed:) Filed March 20th, 1874. Grant I. Taggart, clerk, by Allen Tillinghast, deputy.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of the opinion of Rhodes, J., filed in the above-entitled cause on the 20th day of March, 1874, as shown by the records of my office.

Witness my hand and the seal of the court this 20th day of July, A. D. 1876.

[SEAL.]

D. B. WOOLF, *Clerk*,
By H. P. BUSH, *Deputy*.

54 In the supreme court of the State of California.

HOSMER *vs.* WALLACE. } No. 3430.

It appearing to the satisfaction of the court that the order entered in this cause on the 25th February, 1874, to the effect that the remittitur issue forthwith was entered through inadvertance, it is ordered that the remittitur be recalled, and that the clerk of the court below forthwith return the same into this court.

CROCKETT, J.
McKINSTRY, J.
NILES, J.

(Indorsed:) Filed March 13th, 1874. Grant I. Taggart, clerk, by Allen Tillinghast, deputy.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an order made and entered in the above-entitled cause on the 13th day of March, 1874, as shown by the records of my office.

Witness my hand and the seal of the court this 20th day of July, A. D. 1876.

[SEAL.]

D. B. WOOLF, *Clerk*,
By H. P. BUSH, *Deputy*.

55 Know all men by these presents that we, S. B. Emerson, of the county of Santa Clara, State of California, and Joel Levin, of the same place, are held and firmly bound unto William T. Wallace, of the city and county of San Francisco, in said State, in the sum of two hundred & fifty dollars, good and lawful money of the United States, to be paid to the said William T. Wallace, his executors or administrators; to which payment, well and truly to be made, we do bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, & administrators, firmly by these presents. Sealed with our seals and dated this twenty-eighth day of March, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas in an action pending in the district court of the twentieth judicial district of the State of California, within and for the county of

Santa Clara, wherein one Stephen D. Hosmer is plaintiff and one William T. Wallace is defendant, in which said action an appeal was taken to the supreme court of said State by said plaintiff as appellant, and on said appeal the judgment of said district court was by said supreme court affirmed, said plaintiff appellant as aforesaid is about to prosecute a writ of error to the Supreme Court of the United States to reverse the said judgments of said supreme court and said district court:

Now, therefore, the condition of this obligation is such that if the above named Stephen D. Hosmer shall prosecute his writ of error to effect, and shall answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be & remain in full force and virtue.

(S'g'd) S. B. EMERSON. [L. S.]
(") JOEL LEVIN. [L. S.]

Subscribed and sworn to by S. B. Emerson before me this 28th day of March, A. D. 1876.

[SEAL.] (S'g'd) F. McCOSKEY,
Notary Public.

Subscribed & sworn to before me by Joel Levin this 29th day of March, 1876.

[SEAL.] (S'g'd) T. CLAYTON,
Notary Public.

Approved March 31, 1876.

(S'g'd) L. S. B. SAWYER,
Clerk U. S. Cir. Ct for Cal.

The within bond is approved this 13th day of April, A. D. 1876.

(S'g'd) STEPHEN J. FIELD,
Associate Jus. Sup. Court U. S.

(Indorsed:) No. 3430. Hosmer vs. Wallace. Copy. Undertaking on appeal.

56 In the supreme court of the State California.

HOSMER *vs.* WALLACE. } No. 3430.

I, D. B. Woolf, clerk of the supreme court of the State of California, do hereby certify that the annexed and foregoing are and constitute a true copy and transcript of the record and all of the papers in the above-entitled cause, as the same appears upon the records and files of said court in my office.

And I do further certify that the judgment of this court was rendered on the 25th day of February, 1874, and a remittitur ordered to issue to the court below forthwith, and that on the 27th day of February, 1874, the said remittitur was duly issued. That on the 13th day of March, 1874, an order (a copy of which is hereto annexed) was entered, recalling said remittitur, and the same was duly returned to this office on the 17th day of March, 1874. That on the 1st day of April, 1874, the said plaintiff in error filed a petition for a rehearing of said cause, and that an order was duly entered granting a stay of proceedings until the same be determined, and that on the 8th day of June, 1874, an order was entered denying a rehearing in said cause, and that on the 10th day of

June, 1874, the remittitur was duly issued to the court below, all of which appears on the records in my office. And I further certify that,
57 on the 30th day of May, 1876, said plaintiff in error filed in this court a writ of error (herewith transmitted), duly allowed by the Hon Stephen J. Field, associate justice of the Supreme Court of the United States, removing said cause to the Supreme Court of the United States, and lodged in my office a copy of said writ of error, and, also, on said 30th day of May, 1876, filed a citation (herewith transmitted) purporting to have been served on the attorney for said defendant in error, and also filed an undertaking on appeal in the sum of two hundred and fifty dollars, duly approved, (a copy of which is hereto annexed), conditioned that said plaintiff in error shall prosecute his said writ to effect, and in case he fail to make his plea good, to answer all costs.

Witness my hand and the seal of said court this 27th day of July, A. D. 1876.

[SEAL.]

D. B. WOOLF,
Clerk Supreme Court of the State of California.

(Indorsement on cover:) No. 174. Stephen D. Hosmer, pl'ff in error, vs. William T. Wallace. California sup. court. Filed 30th September, 1876.

REC. 174—3

No. 174.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

HOSMER

Plaintiff in Error,

VS.

WALLACE

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

S. F. LEIB, - Attorney for Plaintiff in Error.

SAN JOSE:

A. B. & H. H. McNeil, Book and Law Printers, 372 First Street.

1878.

No. 174.

IN THE SUPREME COURT

OF THE

UNITED STATES.

STEPHEN D. HOSMER,
Plaintiff in Error,

vs.

WM. T. WALLACE,
Defendant in Error.

BRIEF OF PLAINTIFF.

Statement of Case.

Probably the only material facts of this case are as follows:

On July 16th, 1866, the plaintiff was, and for many years theretofore had been, residing upon the north half of the north half of Section 1, Township 7 South, Range 2 West, Mount Diablo Meridian, in California, containing 160 acres.

About 100 acres of this land *had* been included in a Mexican grant, but was at that date surveyed public land, subject to preemption, having been theretofore excluded from said grant by final survey.

Plaintiff having all the qualifications of a preemptor, on that day filed his declaratory statement, claiming the whole of said land.

On September 4th, following, plaintiff proved up, without contest, and paid for the land, receiving a certificate of purchase therefor.

Thereafter, defendant applied to purchase a portion of the 100 acres (formerly included in the grant) under the 7th Section of the Act of Congress, passed July 23d, 1866. Thereupon the Land Department, considering that that Act cut off a preemptor's rights, assumed to cancel so much of plaintiff's entry as covered the 100 acres, leaving it intact as to the remaining 60 acres.

A patent having issued to defendant accordingly, and the plaintiff, considering that the Land Department had misunderstood the law, filed a bill in equity in the State Court to compel the defendant to convey.

The State Supreme Court decided in favor of defendant, whereupon a petition for a re-hearing

was made, and after due consideration was denied, which rendered the decision final so far as that Court was concerned.

Brockett vs. Brockett, 2 How., 238.
Railroad Co. vs. Bradleys, 7 Wall., 575.
Slaughter House cases, 10 Wall., 289.
McGraw vs. McGlynn, 32 Cal., 257.

Being thus entitled to take the case to this Court, a writ of error was in due time and form obtained and the cause removed here.

Assignments of Error.

1st. The Court below erred in not holding that the right of the plaintiff under the preemption laws was superior to the right of the defendant claiming under the 7th Section of the Act of Congress of July 23d, 1866.

2nd. The Court erred in not holding that a proper construction of the said Act of Congress would prevent any claimant under the 7th Section thereof from entering any land claimed by a qualified preemptor who had filed his declaratory statement thereon, even though he had not paid for it at the date of the passage of the Act.

3rd. The Court erred in holding that it did not sufficiently appear from the record that the plaintiff was not beaten before the Land Department upon questions of fact, instead of upon questions of law, as to the 100 acres of his claim.

4th. The Court erred in not holding, upon the facts disclosed by the record, that plaintiff was entitled to a conveyance from defendant of the land in dispute.

5th. The Court erred in disclaiming jurisdiction to compel such conveyance.

6th. The Court erred in deciding for the defendant and against the plaintiff.

Points and Authorities.

I.

Whether, from the facts appearing from the record, the plaintiff is entitled to a conveyance, is a question manifestly for this Court to determine. And whether the facts are sufficiently stated must be determined by this Court, unhampered by any views of the State Court on that matter; otherwise the jurisdiction of this Court could always

be defeated by the State Court simply saying that the facts were not sufficiently stated, no difference how plainly or fully they may have been set forth in the bill.

In other words, the question is not whether the lower Court ignored the Federal question presented by the record, but whether it could *properly* have done so.

Railroad Co. vs. Maryland, 21 Wall., 467-9.
Tyler vs. Maguire, 17 Wall., 284.
Maguire vs. Tyler, 8 Wall., 664-5.

II.

The District Court wherein the cause was tried grappled with and decided the Federal question squarely though erroneously. The Supreme Court simply affirmed that judgment. True, in its opinion, (which is no part of the record, however), it maintains that it does not appear whether plaintiff was beaten in the Land Department on questions of fact or law. Certainly this case seems to be as perfect in this respect as that of *Warren vs. Van Brunt, 19 Wall., 646,* where it is expressly settled that the record did not disclose what facts were found by the Land Department. Suppose the decision of the officers of the Land Department on questions of fact is conclusive; what effect is

given to it? Simply to preclude further testimony as to the truth of that fact in an action like this. If the defendant relies upon such decision of the Land officers as to what the facts are, he must plead and prove it as he would any other estopple. If he does not, the Court has no right to plead and prove it, or rather *assume* it for him—to *assume* that the facts were by such officers found different from what they are proven and found to be in this action. In this action the facts are alleged and found for plaintiff, and whether the defendant *might* have controlled those findings by showing different findings by the Land officers is immaterial to inquire. Suffice to say he has not even attempted to do so. And he will not pretend to say he could have done so successfully.

The rule above contended for is all that even the broadest intimations of *Johnson vs. Towsley, 13 Wall., 72*, can mean, and is evidently the theory upon which *Warren vs. Van Brunt, 19 Wall., 646*, as well as the previous cases of this Court, is decided.

Were it otherwise, however, we hold that it irresistibly and incontrovertibly appears from the record that the qualifications of the plaintiff as a preemptor, and his right to enter the land in dispute, except for the Act of July 23d, 1866,

were admitted and found by the Land Department:—

1st. Because the Register and Receiver found for plaintiff upon both hearings, one *ex parte* and one contested. They are the officers of the Land Department who saw the witnesses, heard them testify, observed their demeanor and could judge of their credibility. The reason of the rule that makes the decision of the Land Department final on questions of fact, makes the decision of the Register and Receiver final thereon. They are the jurors as it were, the trial judges. "So much depends upon the manner, bearing, character of witnesses and the peculiar circumstances which the transcript fails to preserve, which gives value and weight to testimony," is what is said by our State Supreme Court in *Kimball vs. Gearheart, 12 Cal., 48.* And this is the rule recognized by every Court and by every law of which I have any knowledge. The preemption law itself expressly so declares. "Proof of the settlement and improvement shall be made to the satisfaction of the Register and Receiver," is the language of the great Preemption Act of 1841. The law assumed that these jurors might not be as competent to judge of the law giving the *right* of preemption as their superiors; but not that they could not find

the facts upon which this right is claimed as correctly, especially with all the advantages of having the witnesses before them.

2nd. Because the complaint alleges it and the answer admits it by not denying it.

The complaint alleges in detail the facts going to make up the plaintiff's preemption right and claim. It then alleges that he "made proof of his *said* preemption right and claim," to the satisfaction of the Register and Receiver. In other words, that he made proof of those facts.

3d. Because the Land Department did allow plaintiff to enter the 60 acres.

This 60 acres were irregularly shaped.

Now it appears affirmatively that the facts were proven before the Land Department which were necessary to enable plaintiff to enter this 60 acres. It must therefore be taken as true that the facts were there proven which were necessary to enable him to enter the whole 160 acres, since the proofs must be the same to enter 60 acres as to enter 160 acres. And that it was simply because of the Act of 1866 that he was not allowed to enter the 100 acres is the more apparent because that was precisely what was claimed under that Act, and what was left, (viz: the 60 acres which

were irregular in shape), he was allowed to enter. We refer especially on this point to the very able dissenting opinion of Rhodes, J., in this case, found in the record.

III.

It seems to us that the merits of the case are with us. The 7th Section of the Act of 1866 only allows a defeated grant claimant to enter the land where there was no valid adverse "*right.*" What rights? Imperfect rights? Preemption rights? None other needed protection. And Congress, fearing that even this plain language might be misconstrued, evidently put in by amendment at the end of the 8th Section the clause, "*Provided*, that nothing in this Act shall be construed so as in any manner to interfere with the rights of *bona fide* preemption claimants."

The record discloses the plaintiff to have been such. Even if he had been wrong previous to the final survey, in claiming as a part of his preemption the 100 acres out of his possession, still he was right in making such claim the moment the final survey made it public, preemptible land, especially when that was followed up by the Government survey of that Township, and he was invited by the preemption laws to file his declaratory statement on any 160 acres, according to

legal subdivisions, so as to include his dwelling. No new settlement was necessary.

Boyce vs. Danz, 29 Mich., 146.

"The rights" of preemptioners were protected. The term is broad enough to protect any right; whether there had been proof and payment, or only a right to make proof and payment. But as the right arising from proof and payment already had constitutional, it did not need statutory protection. The rights, therefore, which the statute intended to protect must have been directed mainly, if not entirely, to rights which the statute could have taken away—that is, to rights where there had been no proof and payment.

It must now be taken as settled that Congress *could* have swept away these rights if she chose. But the question was not "what *could* she have done?" but, "what *did* she do?" Instead of sweeping them away, we find that she expressly provides that they should not in *any* manner be interfered with.

What *are* the rights of a preemptor who has fully complied with the law—filed his declaratory statement—but has not yet made proof and payment? It is his right, (which Congress alone can defeat), to make proof and payment, and, in due

course, receive his patent. And if this right is not accorded him by the Land Department, a Court of Equity will correct the wrong by controlling the patent to his use.

Hess vs. Bollinger, 48 Cal., 349, and cases cited on pages 351-2, and Point V *of this Brief.*

This right was expressly saved to us. But the right, at least as far as receiving the patent was concerned, was not accorded to us by the Land Department, and, under the rule just stated, we should have the wrong corrected by a Court of Equity.

Hosmer, from the Spring of 1863, had his house on public, preemptible land. From June 28th, 1865, all the land in his claim was public, preemptible land. Whether he *went* there under a mistaken notion of his legal rights or not, we care not. There he was on June 28th, 1865, and there he was legally. There is no law, and no reason can be assigned, why he should move off at that time, and then move on, in order to become a preemptor. The cases are uniformly the other way. *Boyce vs. Danz, 29 Mich., 146.* Nine-tenths of preemption settlements in the State of California were made when the land was not open to settlement, (it being unsurveyed), and of this Congress

was well aware when she inserted this provision. Thus the matters continue for over a year, during all of which time plaintiff was claiming the land as a preemptor. In the meantime the Township was sectionized by the Government, and in due time the plaintiff filed his declaratory statement. All this occurred before the passage of the act. All that could be done to give him rights as a preemptor he had done; and if there is any case whatever where the rights of a preemptor *could* have been swept away by act of Congress, but were saved by the act itself, then this case is among the number.

After this case was decided, the Supreme Court of this State, upon a bill precisely identical with this, discussed the case on its merits, and dismissed the bill, on the ground that the plaintiff was not protected by the above recited proviso, because the plaintiff was not in possession of that part of his preemption claim sued for at the time of filing his declaratory statement. *Rutledge vs. Murphy, 51 Cal., 388.* Indeed that was the precise ground upon which the Commissioner and Secretary of the Interior decided the case.

The point is evidently not well taken, for several reasons:—

1st. There is no law requiring a preemptor to have in possession the whole of his claim.

2nd. It would be impossible for a preemptor to ever pay for and enter his land if such were the case, for nine times out of ten some one else is in possession of a portion of it.

It is rare indeed that the lines of a preemptor's actual possessions agree with the lines of the public surveys, and yet the declaratory statement must be made according to the latter, and must, therefore, necessarily, in nearly every instance, cover the actual possessions of some one else.

Many times a preemptor has 160 acres in possession, but not the whole of any one 40 acre subdivision, and where he has, his dwelling may not stand on that one.

3rd. The Act of July 23d, 1866, itself would otherwise be absurd, for by its very terms a claimant under it cannot claim its benefits who is not in possession, irrespective of whether there was a preemptor claiming it or not. The above recited clause must, therefore, refer to lands not in the preemptor's possession.

One of the absolute essentials which a claimant under the Act of July 23d, 1866, must show, in order to avail himself of its benefits, is that at the

date thereof he was then, and from his purchase continuously had been in the possession of the land. If he fails to show that, then that of itself and in itself defeats his claim. He will not be allowed to question the claim of any one else to it, for in no event will *he* be allowed to enter it. His non-possession of itself defeats him, and the moment that fact is ascertained he drops out of sight.

But even if he is in possession, still he shall not be allowed to enter it if there exists any "valid adverse right or title." Section 7.

It appears, then, that there *can* be a valid right or title to the land by one *not* in possession. And it seems that this "right" shall be protected, too. Not only every "valid *title*" is protected, but likewise every "adverse *right*."

What rights? Unperfected rights—for perfected rights would *need* no protection by statute? They would be protected against the statute by the Constitution of the United States.

But Congress was not content with this general protection. She evidently did not mean to be misunderstood in this matter. She provides in the next Section (Section 8) that "nothing in this Act shall be *construed* so as in *any* manner to in-

terfere with the rights of *bona fide* preemption claimants." Therefore, the statute itself recognizes the fact that preemption claimants may have "rights" to lands *not* in their possession; for if they were *in* possession, that fact of itself, whether they were preemptors or not, would, by the very terms of the statute, defeat the grant claimant's claim. This provision, then, must have been inserted to protect the rights of *bona fide* preemption claimants to lands not *in* their possession, as otherwise it must irresistibly follow that Congress in inserting the provision did an idle, useless, meaningless, foolish and absurd act.

The fallacy of the proposition is fully shown by the dissenting opinion of Rhodes, J., in *Rutledge vs. Murphy, 51 Cal., 397*, to which especial reference is made.

The equities of the claimant's under grants were urged below. We can hardly recognize such equities. The Government had been sufficiently generous before. By their grant they were entitled to only a certain amount of land and no more. The Government allowed them the possession, and the rents and profits of much more, until the amount to which they were justly entitled had been segregated from the whole; and if, after that was done, the Government chose to give them the

balance, to which they had not a shadow of claim upon her, either in law or in equity, it is not to be presumed that she intended to do so when there was any "valid adverse right or title" existing, (Section 7), or when it would "in *any* manner interfere with the rights of *bona fide* preemption claimants." (Section 8.) The act clearly shows that if the Government chose to exercise this munificent generosity, that it was her intention that it should in no case be to the prejudice of the rights of her *bona fide* preemption claimants, who have always been the favored objects of her bounty, whose honest industry and hardy toil have cleared her forests, built up her waste places, made the mighty West to teem with boundless wealth, and caused the Government herself to be what she is. The preemption law is made to benefit the poor man. He is expected to be and always is poor. If he owns over 320 acres of land, or has ever preempted before, he cannot preempt at all, and can preempt but 160 acres in any case. On the other hand, the grant claimant can purchase a thousand acres under the act, even if he already owns ten thousand acres. The taking a dollar and a quarter per acre for her public land of much greater value, of which she is the legal and equitable owner, and which is free from any claims in morals, equity or law, is certainly exercising a

charity by Congress toward some one. To whom, think you, was Congress most likely to extend her bounty and generosity—to the poor man, or to the rich?

"It cannot be successfully controverted that the preemptioner belongs to a favored class of purchasers." *Hutton vs. Frisbie, 37 Cal., 504.*

The Suscol cases were urged below as showing strong reasons why our rights were taken away by this act. To us they furnish the strongest arguments to the contrary.

The Suscol Act was passed in 1863. At that time the belief was general that that act would not interfere with the rights of preemptors, whether there had been proof and payment or not.

It was a long while thereafter before that belief was dispelled. As late even as 1870 Mr. Justice Crockett wrote one of the ablest, logical and most vigorous and forcible opinions of his life in its support.

Hutton vs. Frisbie, 37 Cal., 500.

But the soundness of this general belief had been questioned long before that, although not finally overturned until the subsequent decision of the United States Supreme Court. Between 1863 and 1866, while this general belief was still cur-

rent, the Land Department so construed the Suscol Act as to interfere with and destroy the rights of preemptors who had not made proof and payment, because, it said, the act had not preserved their rights. While the question was still wrapped in doubt, the Act of 1866 was passed. And evidently, (and we venture to say the history of and the debates upon the bill will show it), Congress intended that this act should specially and expressly preserve such preemptor's rights, the omitting to do which in the Suscol Act had visited upon them such disastrous consequences. The provision at the end of Section 8 was evidently put in by way of amendment. And while we bear in mind that this act was passed and this provision inserted at the time that it was being contended and decided that the rights of the preemptors who had not made proof and payment were cut off by the Suscol Act, because no such provision had been inserted, we can reach but one conclusion—that Congress intended to save just such rights by inserting this special, express provision.

IV.

The plaintiff's proof and payment, whether rightful or wrongful, had the effect to render the land no longer public land.

People vs. Shearer, 30 Cal., 645.

Witherspoon vs. Duncan, 4 Wall., 210.
United States vs. Stone, 2 Wall., 535.
Carroll vs. Safford, 3 How., 461.
Byers vs. Neal, 43 Cal., 210.

If wrongful, nothing but a judicial proceeding could set it aside.

United States vs. Stone, 2 Wall., 535.

Indeed it may well be questioned whether the Commissioner had the right to interfere at all. And this on two grounds:—

1st. Because he has no power by the statute to act at all except where his action concerns *public* lands. And by permitting plaintiff's proof and payment he allowed it to cease to be public land, and therefore could thereafter no longer deal with it.

Act of 1836.

2nd. No law has been cited where he has any power at all except as between two preemptors.

Boyce vs. Danz, 29 Mich., 151.

V.

It will not be disputed that in a proper case, (which we claim the present to be), the Courts have jurisdiction to control the legal title in the hands of the wrong party.

McDowell vs. Morgan, 28 *Ill.*, 528.
Shelton vs. Keirn, 45 *Miss.*, 106.
Boyce vs. Danz., 29 *Mich.*, 146.
Hess vs. Bollinger, 49 *Cal.*, 349.
Bird vs. Ward, 1 *Mo.*, 398.
Lytle vs. Arkansas, 9 *How.*, 339.
Cunningham vs. Ashley, 14 *How.*, 388.
Garland vs. Wynn, 20 *How.*, 6.
O'Brien vs. Perry, 1 *Black*, 132.
Lindsey vs. Hawes, 2 *Black*, 558.
State of Me. vs. Batchelder, 1 *Wall.*, 115.
United States vs. Stone, 2 *Wall.*, 535.
Hughes vs. United States, 4 *Wall.*, 236.
Stark vs. Starrs, 6 *Wall.*, 419.
Silver vs. Ladd, 7 *Wall.*, 224–8.
Johnson vs. Towsley, 13 *Wall.*, 72.
Samson vs. Smiley, 13 *Wall.*, 91.
The Yo Semite case, 15 *Wall.*, 77.

And, as before remarked, where the record shows it to be a proper case, the jurisdiction therefrom arising cannot be defeated in this Court by the lower Court disclaiming such jurisdiction.

We respectfully and confidently pray for a reversal of the judgment of the Court below, and ask that judgment be directed to be entered for plaintiff.

S. F. LEIB,
Attorney for Plaintiff in Error.

BRIEF FOR DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES.

No. 174

STEPHEN D. HOSMER,
Plaintiff in Error,

vs.

WILLIAM T. WALLACE,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

GEO. A. NOURSE,
Counsel for Defendant in Error.

Supreme Court of the United States.

STEPHEN D. HOSMER,
Plaintiff in Error,
vs.
WILLIAM T. WALLACE,
Defendant in Error.

In Error to the Supreme Court of the State of California.

BRIEF FOR DEFENDANT IN ERROR.

This action was commenced in the District Court of the State of California for the then Third Judicial District, County of Santa Clara.

The relief sought is, that the defendant be declared a trustee for the benefit of plaintiff, as to the lands described in the complaint (Lots 2 and 6, Sect. 1, Township 7 South, Range 2 West, Mt. D. M.), and that said defendant be decreed to convey said premises to the plaintiff.

It is claimed, that the complaint states facts which entitled plaintiff to enter as a pre-emptor at the proper U. S. Land Office, the N. ½ of N. ½ of section 1 in said township (embracing said lots two and six with other land), and to receive a U. S. patent therefor; and that said plaintiff did, in fact, enter and pay for said land at the local land office, and was thus entitled to a patent for it from the United States.

The defendant having subsequently obtained a U. S. patent for said Lots 2 and 6 as a purchaser under Section 7 of the Act of Congress approved July 23, 1866, entitled "An Act to quiet land titles in California," plaintiff claims, that said defendant holds the legal title thus acquired as a trustee for himself — the plaintiff aforesaid.

The defendant does not view the matter in this light, but says that the entry made by plaintiff in the U. S. Land Office at San Francisco was set aside by the Commissioner of the General Land Office, whose decision was affirmed by the Secretary of the Interior. He claims, therefore, that plaintiff has no interest in the title held by him, the said defendant, and claims to hold it for his own benefit: Hence this suit.

Without repeating the allegations and denials of the pleadings, I will state briefly as possible, the facts in the case as established by the admissions of the pleadings, and by the findings.

STATEMENT OF FACTS.

I.

The *Rancho Pastoria de las Borregas* was granted to Francisco Estrada by the Mexican government before the acquisition of California by the United States. Said grant was duly confirmed to the grantees of Estrada for a less area than that embraced within its exterior boundaries, and the survey was finally affirmed by the United States Circuit Court, June 25, 1865.

Prior to Feb. 11, 1862, one Daniel Lyons had purchased from the grantees of Estrada the grant title to a portion of the land lying within the exterior boundaries of said grant, including, with other land, the tract which became, on survey of the township by the United States, the North half of the Northeast quarter of Section one, in Township seven South, Range two West, Mt. D. M.

On this last described tract plaintiff had settled in October 1856, and erected thereon a house and other improvements. He claimed to make this settlement under the U. S. pre-emption laws; but there was no U. S. statute in existence from March 1 1856, to May 30 1862, authorizing pre-emption settlement on unsurveyed land of the United States in California.

Feb. 11, 1862, said plaintiff was evicted from the

tract occupied by him, by the sheriff of the county, under process issued upon a judgment against him in an action of ejectment brought against him by said Daniel Lyons, for recovery of possession of said tract; and Lyons, and those claiming under him, were put in possession by said sheriff. About the time of said eviction (the record does not show whether before or after) the defendant purchased from Lyons a part of the said tract purchased by him from the assignees of the grant; said purchase including (with other land), the land now known as Lots 2 and 6 in said Section 1.

Immediately upon said eviction, said plaintiff removed from that portion of said tract now known as N. ½ of N.E. ¼ of said Section 1, all his houses and out-buildings, using the material as far as he could, in the construction of buildings and fences on other and adjacent lands.

In the spring of 1863, said plaintiff moved into a house upon land which is now embraced in the N.W. ¼ of N.W. ¼ of said Section 1, and has ever since resided there, having in his possession said last named tract, and all the N.E. ¼ of N.W. ¼ of said Section 1, except that part now described in the official plat as Lot XI.

Soon after said grant survey in June 1865, excluding therefrom a portion of the land within the exterior boundaries of the grant, a survey was made by the United States, of that portion of said Township 7 South, in Range 2 West, Mt. D. M., which was not taken by Mexican grants.

This survey (made, and the plat filed in 1876) with the U. S. surveys of adjoining townships, brought the land bought by Lyons into four different townships, a part in each, as shown by the plat at page 12 of the transcript in this case, which is attached to and forms part of the findings of the District Court.

The U. S. survey, which I have mentioned, was made without reference to Lyons' purchase, or to its boundaries, or to the grant lines, with township and section lines running due north and south, or east and west; while the lines of Lyons' purchase did not at all correspond in direction with the cardinal points of compass.

Within three months after the plat of said township, according to said survey, was filed in the proper U. S. land office (at San Francisco), plaintiff filed in said land office his declaratory statement, claiming to pre-

empt the N. ½ of N. ½ of Sect. 1, and alleging settlement thereon in October 1856.

About Sept. 4, 1866, no other claim to said land having been filed in said land office, plaintiff made before the Register and Receiver, *ex parte*, his proof, and was allowed by them to enter the land claimed by him. He paid for it and received his duplicate receipt for such payment, from the Receiver.

Meanwhile, the Act of July 23, 1866, had just been passed, giving purchasers under Mexican grants a pre-emption right, as to their lands excluded from the grant by its final survey.

There was no overland railroad then, and the official notification of the passage of the statute could hardly have reached San Francisco until late in August. So defendant is not justly chargeable with *laches* in not sooner asserting his rights under it.

He took such measures to represent the facts to the Commissioner, that this officer, in December 1866, sent the case back to San Francisco for re-investigation.

On the fourth day of May 1867, an amended and supplemental survey of the section was made by the U. S. Surveyor-General, and the plat filed in U. S. land office, which is copied with sufficient accuracy at page 12 of the transcript. According to this map that portion of defendant's purchase from Lyons which is embraced in plaintiff's claim, is described as Lots 2 and 6 in said Section 1.

May 24, 1867, defendant filed in said land office his application to enter said Lots 2 and 6, with other land; and thereupon said parties plaintiff and defendant proceeded to offer evidence, under said instructions of the Commissioner, in support of their respective claims. They completed the task during that year, and the Register and Receiver thereupon awarded to plaintiff all the land claimed by him.

Upon appeal to the Commissioner of the Gen. Land Office, this decision was reversed, and Lots 2 and 6 were awarded to defendant.

This decision was confirmed by the Secretary of the Interior, on appeal to him.

Thereupon defendant made payment for these lots, and received his duplicate receipt for such payment, and in due time, a United States patent therefor.

DEFENDANT'S CASE

Rests upon the following propositions:

I.

The legal title vested in defendant by United States patent. It can only be taken from him by a judgment of a court of competent jurisdiction, in an action brought by the United States for the purpose, vacating the patent, or by a decree of such court declaring him a trustee, as to said title, for the benefit of some other person, and compelling him to convey to such beneficiary.

The plaintiff in this action seeks to have such trust declared by decree of the District Court in his favor; claiming that the U. S. patent should have been issued to him, and not to the defendant.

II.

To establish a trust on this ground, in this case, plaintiff must show that the facts existed which gave him the better right to the U. S. patent;—that these facts were proven to the U. S. Land Officers;—and that said officers erred in awarding the right of entry to defendant, and refusing it to plaintiff, by erroneous construction of the law as applicable to the facts proved.

1.—It is now the settled law that no court can review the decision of the Land Department of the United States upon any question of *fact*.

***Johnson* v. *Towsley*, 13 Wallace, 72 (p. 86).**

2.—It is equally well settled that in case of a decision obtained from the Land officers of the Government by mistake, imposition or fraud,—or by misconstruction of the law, in its application to the facts, as found by them, a court of equity will give relief by declaring the owner of the legal title a trustee for the benefit of the equitable owner. (Same case.)

"Where persons in good faith and for a valuable "consideration, have purchased land of Mexican "grantees, or assigns, which grants have subsequently "been rejected, or where the lands so purchased have "been excluded from the final survey of any Mexican "grant, and have used, improved and continued in the "actual possession of the same as according to the "lines of their original purchase, and where no valid "adverse right or title (except of the United States) "exists, such purchasers may purchase the same after "having such lands surveyed under existing laws, at "the minimum price established by law, upon first "making proofs of the fact as required in this section, "under regulations to be provided by the Commis- "sioner of the General Land Office."

2.—The findings of the District Court in this action, establish the facts that defendant,
a—Had bought from the assignee of the original grantee of the Mexican grant *Pastoria de las Borregas*,
b—In good faith and for a valuable consideration,
c—Land afterwards excluded from the final survey of said grant, though within its exterior boundaries, and
d—"Had used, improved, and continued in the actual "possession of the same, as according to the lines of "his original purchase" to the time of trial of this action.

(See findings 7 and 16 of District Court: folios 27 and 30 of Transcript.)

e—The only question left is, whether there was at the date of the passage of the said Act of July 23, 1866, any "valid adverse right or title" other than that of the United States, to this claim.

It is not claimed that there was any "other adverse right or title" to the land unless it were that of plaintiff. If, at the date of the passage of the Act, the plaintiff had a "valid adverse right or title" to the land in dispute, and proved the fact before the Register and Receiver, of course defendant should not have been permitted by the land department, to enter it. For entry under said section 7 was only allowed "*where no valid* adverse right or title (except of the United "States) exists." If plaintiff had no such "valid adverse right or title," then defendant's right to his patent-title was and is perfect. We will then best establish defendant's title by showing, as we will proceed to do, that

VI.

Plaintiff never made any pre-emption settlement or improvement upon; and never, while the land was open to pre-emption, inhabited the land in controversy, or any part thereof, nor any part of the north half of the north-east quarter of Section 1, in which the lots in dispute are included;—and never had a house upon any portion of said land,—at a time when it was open to pre-emption settlement.

It will be noticed, that plaintiff's counsel, in drawing his complaint, has carefully (and with an object) treated the land claimed by his client, as one entire tract; describing it as "the north half of the north half of Section One," &c. He alleges settlement upon and improvement of this, *as one tract.*

(Fols. 3 and 4 of Transcript.)

In fact, this description embraces *four* legal subdivisions, according to the U. S. Government survey, to wit—N.E. ¼ of N.E. ¼,—N.W. ¼ of N.E. ¼,—N.E. ¼ of N.W. ¼ and N.W. ¼ of N.W. ¼ of said Section One. Plaintiff's claim would, in Land Office practice, be described as the N. ½ of the N.E. ¼, and the N. ½ of N.W. ¼ of said section; two separate parcels, instead of one entire tract.

1.—Plaintiff's first settlement, as described by the findings, was made in October 1856, upon *the north half of the north east quarter* of Section 1.

This was not a "pre-emption" settlement, for the reason that the land, from two causes, was not then, nor for a long time after, open to pre-emption settlement; as will presently appear.

2.—The first statute opening *unsurveyed* land in California to pre-emption settlement was that of March 3, 1853, entitled "An Act to provide for the survey of "the public lands in California, the granting of pre-"emption rights therein, and for other purposes."

10 U. S. Stat. 244.

Section 6 of that act subjected to the pre-emption laws of Sept. 4, 1841, all public lands in this state, whether surveyed or unsurveyed,—with certain specified exceptions which do not affect the case at bar.

This provision was limited in its operation, as to *unsurveyed* lands, to settlements made within one year from the date of the act. (See said Section 6.)

By the Act of March 1, 1854, entitled "An Act for "the extension of the pre-emption privilege in the "State of California," the privilege of pre-emption settlement on unsurveyed land was extended two years from that date,—to March 1, 1856, when it expired by limitation.

10 U. S. Stat. 265

3.—No other statute was enacted opening unsurveyed land in California to pre-emption settlement, until the passage of the Act approved May 30, 1862, entitled "An Act to reduce the expenses of the sur- "vey and sale of the public lands in the United States."

12 U. S. Stat. at Large, p. 409.

Section 7 of this act (p. 410) extended to California the pre-emption privilege on unsurveyed lands.

4.—Plaintiff's first settlement on any of the land claimed by him, was made in October 1856, on N. ½ of N.E. ¼ Section 1.

(See *First Finding*, fol. 25.)

At that time the land was unsurveyed, the U. S. survey not being made (fol. 7) until April 1866.

At the time of said settlement, said tract was within the exterior boundaries of the Mexican grant *Rancho Pastoria de las Borregas*, of which grant the final survey,—excluding this land,—was not made until June 1865. Until such survey, the land within the exterior boundaries of the grant, was not "public land," and so not subject to pre-emption settlement.

92 U. S. Rep. 761—*Newhall* v. *Sanger*;
95 U. S. Rep. 33—*Van Reynegan* v. *Bolton*.

5.—The plaintiff, who was thus settled on this land without authority of law, was, in February 1862, evicted therefrom by the sheriff of the county, under process issued upon a judgment of the District Court in an action of ejectment brought by Daniel Lyons, defendant's grantor, for recovery of possession of these premises. (Folios 6 and 25 6.) Said Lyons claimed under the grant title; the grantees and those holding under them, being entitled to possession of all the land within the exterior boundaries of the grant, until the tract granted should be surveyed and segregated from the remaining land within such boundaries.

13 Cal. 410, *Waterman* v. *Smith*;
16 Cal. 429, *Cornwall* v. *Culver;*
18 Cal. 200–2, *Riley* v. *Heisch;*
21 Cal. 576–7, *Mahoney* v. *Van Winkle*;
24 Cal. 569, *Thornton* v. *Mahoney* (579–80);
95 U. S. 33—*Van Reynegan* v. *Bolton.*

6.—Upon his said eviction, plaintiff abandoned said N. ½ of N.E. ¼ of said Section 1, removing therefrom all his houses and outbuildings, and, so far as practicable, using the material in the construction of buildings and fences upon other lands adjacent.

(Thirteenth finding, fol. 29.)

7.—"Said plaintiff has never inhabited, cultivated, "or improved said N. ½ of N.E. ¼ of Sect. 1, nor any "part thereof, nor any land adjoining, since his said "removal therefrom." The complaint shows (fol. 6) that plaintiff was evicted from Lot XI, as well as from N. ½ of N.E. ¼, leaving him in possession only of land *cornering* upon said N. ½ of N.E. ¼ of said Section 1.

(Fourth finding, fol. 26.)

8.—He did not go again upon any portion of the said N. ½ of N. ½ of Section 1 until the spring of 1863, when he settled upon the N.W. ¼ of N.W. ¼ of said Section 1.

This is the allegation, not denied, of his complaint (fol. 13). The finding that plaintiff has resided on N. ½ of N.W. ¼ Sect. 1, ever since his eviction from N. ½ of N.E. ¼, in February 1862, must be restricted to that portion of said N. ½ of N.W. ¼ to which the complaint limits it.

This is not important, save as it shows that, "in the spring of 1863," plaintiff made *a new settlement* on said NW. ¼ of N.W. ¼, and that his residence thereon was not a continuation of the residence established by him in 1856, upon N. ½ of N.E. ¼—there being a gap of nearly or quite a year between his eviction in Feb. 1862, and his new settlement in "the spring of 1863."

9.—This settlement thus made in 1863, upon land in the *Northwest quarter* of Sect. 1, could not extend to land in the *North half of the Northeast quarter* of that section:—nor indeed to any portion of Lots XI, XII, or XV in the N. ½ of NW. ¼ of said Section 1; for, as before shown by the plat at fol. 30½, these last named tracts were within the exterior boundaries of the grant, and so not public land, nor open to pre-emption settle-

ment until the grant survey in 1865. Besides, as just suggested, the land last settled upon only covered a portion of N. ½ of N.W. ¼ of Sect. 1.

The court finds that plaintiff has never abandoned, or relinquished his intention to pre-empt the land (N. ½ of N.E. ¼) settled upon by him in 1856, and by him occupied until Feb. 1862; but no *mere intention* of the settler can extend his settlement over land not open by law to pre-emption.

10.—Plaintiff is not found nor alleged to have done any act of settlement on N. ½ of N.E. ¼ since it became public land, on the final survey of the grant in 1865. On the contrary the court finds (fourth finding, fol. 26) that he has never, since his eviction in 1862, "inhab- "ited, cultivated or improved" it, "nor any part "thereof."

So plaintiff's pre-emption settlement was made "in the spring of 1863," and of course extended only to that portion of the land claimed by him, which was then open to pre-emption settlement. This we have seen to be N. ½ of N.W. ¼ of Sect. 1, except what is now embraced in Lots XI, XII, and XIV; the land in these lots and in N. ½ of N.E. ¼ of Sect. 1, being within the exterior boundaries of the grant.

If he should be held to have settled thereon in Feb. 1862, on his eviction from N. ½ of N.E. ¼,—still, this would not become a "pre-emption" settlement until the land was, by the statute of May 30, 1862, opened to pre-emption; and the settlement then made could not extend to land not then subject to pre-emption.

There is no operation of law which can extend over a given tract of land of the United States, when it is first opened, by statute or survey of a grant, to pre-emption,—a settlement made on adjoining land, before such tract was so opened to pre-emption. A "settlement" necessarily implies some act of the settler.

11.—To hold that plaintiff ever had a pre-emption right to N. ½ of N.E. ¼ of Sect. 1, or any part thereof, this court would have to hold that such pre-emption right could exist without settlement, inhabitancy, or improvement upon the land and without having a house thereon—by virtue merely of a settlement, &c. on land cornering upon the said tract before such tract was open to pre-emption.

VII.

Plaintiff has no rights in this action by virtue of his entry of and payment for the land claimed by him, made in Sept. 1866, nor by virtue of the duplicate receipt (loosely called "patent certificate," or "certificate of purchase" in some reported cases) given him by the Receiver at the U. S. Land Office, on his making such payment.

1.—Said entry was set aside by the Commissioner of the General Land Office, by virtue of the power of supervision and control of all matters pertaining to the sale of public lands of the United States, given him by the Act of Congress approved July 4, 1836, entitled "An Act to re-organize the General Land Office."

This Act provides (Sect. 1, Vol. 5 U. S. Statutes at Large, p. 107):

"That from and after the passage of this Act, the "executive duties now prescribed, or which may here- "after be prescribed by law, appertaining to the sur- "veying and sale of public lands of the United States, "or in any wise respecting such public lands, and, "also, such as relate to private claims of land and the "issuing of patents for all grants of land under the "authority of the Government of the United States, "shall be subject to the supervision and control of the "Commissioner of the General Land Office, under the "direction of the President of the United States."

2.—Under said Act the Commissioner had full power to vacate and set aside the entry, and cancel the receipt, or "patent certificate."

This Act was in force when the decision of the Commissioner was made in this matter of contest in the General Land Office between plaintiff and defendant.

In the court below, counsel for defendant claimed that the Commissioner had no power to set aside the entry made at the local land office by plaintiff (before defendant's application was filed)—plaintiff having thereon paid for the land. He cited several cases in support of this doctrine, which I will briefly discuss. In

Witherspoon v. *Duncan*, 4 Wallace 210.

The court first lays down the rule, as counsel claims it, in cases where the entry is not set aside by the Com-

missioner, but adds (p. 220): "*It is true that the entry "might be set aside at Washington, but this condition at-"taches to all entries of the pub'ic lands.*" In

Carroll v. *Safford*, 3 How. 441,

The court, while holding that the equitable title to Government lands sold passes to the purchaser on payment of the purchase money and issue of the "patent certificate,"—recognizes the fact (p. 461) that "out of "one hundred certificates, patents were refused on "fourteen of them," without questioning the power of the Commissioner so to refuse patents, and set aside the entries, and sell the land over again. In

People v. *Shearer*, 30 Cal. 645,

it appeared that the purchase money was never paid; and on that ground the land was held not taxable. No question was raised as to the supervisory power of the Commissioner.

The following cases, also cited by counsel to this point, viz:

Astrom v. *Hammond*, 3 McLean, 107;
Moyer v *McCullough*, 1 Ind. 339;
Doe v. *Stephenson*, 9 Ind. 144;
Morton v. *Blankershit*, 5 Mo. 346,

were all decided *before the statute above cited (of July* 4, 1836) *was enacted.* In

Arnold v. *Grimes*, 2 Iowa, 77,

nothing is decided, save, that a patent is not impeachable in an action at law, for alleged fraud in obtaining it. Nor does any question about the Commissioner's power of supervision arise in

Rogers v. *Brent*, 5 Gil. Ill. 573.

In *O'Brien* v. *Perry*, 1 Black, 132, the decision was, not that the Commissioner had no power to cancel a certificate of purchase—but that he erred in his application of the law to the facts *in that case.* That case is in perfect accord with that of *Johnson* v. *Towsley*, which we will hereinafter cite. In *Lindsey* v. *Hawes*, 2 Black, 554, the Commissioner had cancelled and set aside a certificate of purchase given by the Receiver. His power to do so was not questioned by the court. It was decided simply, that the Commissioner had erred in his action, adopting an incorrect view of the law upon the facts admitted. In

Stone v. *Young*, 5 Kansas, 229,

here was no question as t o the lawfulness of the entry, or the power of the Commissioner to annul it and cancel the "patent certificate." The only question was as to the right of the purchaser from the United States to sell and convey the land before patent issued. In deciding that he has this right, the court speak of the land as the property of the purchaser, and of the U. S. Government as merely holding the legal title in trust for the purchaser after entry and payment. But there was no question raised as to the lawfulness or regularity of the entry, or of the Commissioner's power of supervision.

This completes the list of authorities cited in the court below in support of counsel's proposition that the Commissioner has no power to cancel an entry made with the Register and Receiver of the local U. S. Land Office. It will be seen that not one of them even tends to support this position—which the Act itself so plainly shows to be unfounded.

On the other hand, this court has held in terms, that under the Act of Congress of July 4, 1836, cited ante, the Commissioner has a direct supervision over the Registers and Receivers of the land offices, and therefore the judgment of these officers is not conclusive.

18 How. 43, *Barnard's Heirs* v. *Ashley's Heirs.*

(See pages 44–5.)

This court again held that the decision of the Commissioner, and of the Secretary of the Interior, on appeal from the Commissioner, is final, in the land department, in all cases where the decisions of the Register and Receiver are reviewed by these officers.

13 Wallace, 72, *Johnson* v. *Towsley*, (p. 82–3.)

In a still later case, the action of the Commissioner (approved by the Secretary) in cancelling certain entries of lands made before the Register and Receiver, was emphatically sustained by this court. See

Eldred v. *Sexton*, 19 Wallace, 189.

In a case decided by the Supreme Court of California,

50 Cal. 211—*Hestres* v. *Brennan*,

it was held that the Secretary of the Interior has a *supervisory* power over the decisions of the Commissioner of Gen. Land Office, even in the absence of an appeal (for which the law makes no provision) and

No. 174.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

HOSMER

Plaintiff in Error,

VS.

WALLACE

Defendant in Error.

PETITION FOR RE-HEARING.

S. F. LEIB, - - Attorney for Plaintiff in Error.

SAN JOSE:

A. B. & H. H. McNEIL, Book and Law Printers, 372 First Street.

1879.

No. 174.

IN THE SUPREME COURT

OF THE

UNITED STATES.

S. D. HOSMER,
Plaintiff in Error,

vs.

WM. T. WALLACE,
Defendant in Error.

PETITION FOR RE-HEARING.

The Plaintiff in Error most respectfully offers the following suggestions for a re-hearing, in accordance with the rule laid down in the case of *Public Schools vs Walker, 9 Wall, 603.*

The case, divested of all immaterial matter, may thus be stated:

On July 16, 1866, a quarter section of land was public surveyed land of the United States. I say a "quarter section," because four forty acre sub-divisions contiguous to each other are equivalent to a quarter section, and may be entered by a preemptor in the same manner.

Preemption Act of 1841, Sec. 10, 1 Lester Land Laws, page 62.

Instructions of Commissioner of General Land Office thereon, 1 Lester Land Laws, page 363.

This quarter section was in possession of the plaintiff and the defendant. The plaintiff, on the portion he had possession of, had a dwelling house, improvements, and cultivated the same, and claimed the whole 160 acres as a preemption claim. The defendant was, and for a year theretofore had been in possession of his portion as a trespasser to the United States. The plaintiff, under these circumstances, filed a declaratory statement on the whole 160 acres, in accordance with legal sub-divisions.

The opinion in this case concedes, as I understand it, that if plaintiff *rightfully* filed his declaratory statement on 160 acres, according to legal sub-divisions, notwithstanding a portion thereof was in the possession of a trespasser, that his preemption claim would be protected

by the clause at the end of Section 8 of the Act of July 23, 1866. But the Court holds, or at least this is the logical result of its position, that the plaintiff *ought* to have filed, not according to legal sub-divisions, but in accordance with the lines between himself and the trespasser. Either that, or else not only would the portion of the legal sub-division in the trespasser's possession be precluded from preemption entry, but the remaining portions thereof in the possession of a preemption claimant would be equally precluded from such entry.

I assume that whether plaintiff's claim of preemption, prior to the sectionizing of this section, was rightful or not, at least it was so thereafter; *and that to make it so, the laws did not require him to go through the wasteful farce of burning his dwelling, tearing down his fences, and destroying his crops, in order that he might rebuild, reimprove, and replant.*

Boyce vs Danz, 29 Mich, 146.

The question, then, plainly stated, comes down to this:

Suppose a legal sub-division, and to illustrate the more forcibly, we will take the smallest legal subdivision, a 40 acre tract, is divided by a fence. On

one side is a trespasser, on the other is a preemptor, who has performed all the acts necessary to preempt. Must the preemptor file according to the fence line or according to the Government lines?

If a portion of a legal sub-division is taken by the sea, or a river, or swamp land, or a finally confirmed survey of a Mexican grant, or the like, the fractional remainder can be entered *as* a fractional sub-division, under a preemption claim. The laws expressly so provide.

But where is the law, or where is the decision which says that this can be done where the portion to be excluded from the preemption entry is simply occupied by a trespasser?

If so, how is it that the public surveys have never shown the possessions of trespassers, or numbered what was left as lots subject to preemption?

And how is it that the Government has invariably allowed the preemptor to enter according to legal sub-divisions, and the Courts enforced the patents therefor against any trespasser holding possession of a part thereof?

Indeed, was there ever a case, in California at least, where a preemptor had built his fences exactly according to the Government lines?

The opinion in this case would seem logically, to lead us one step further, viz: that a preemptor could only enter such portion of the legal subdivision as he had actually improved. But is this the law?

He must file for what he expects to enter, and he must file within a very limited time after his right to do exists. He is allowed to enter 160 acres. Does the law pre-suppose that within this limited time a poor man, without servants, can have improved the whole of this large tract of land? Was it ever done? Can a decision or law be found requiring it to be done?

A poor man goes into the mighty forest, clears away 10 acres, builds a cabin, and plants his "clearing." By that time he is compelled to file his declaratory statement. The remaining 150 acres are as absolutely untouched as though he were a thousand miles away. But does any one question his right to file for the whole 160 acres because he had not improved 150 acres thereof? And would his right to file for it be changed because it was in the possession of some trespasser? If so, for what reason, and on what theory?

He has committed no breach of the peace, as was the case in *Atherton vs Fowler, 96 U. S., 516.*

His dwelling is on land in his own possession, and so are his improvements. Such is the case at bar. He has done everything the law requires of him.

Finally: If it be true that he cannot enter that portion in the trespasser's possession, then *no part* of the sub-division can be entered, for he is compelled to file according to the legal sub-division, or not at all.

We suggest these reasons not so much because of the amount involved in this case, which is comparatively inconsiderable, but that it may not be a precedent for other cases.

If my construction of this decision is correct, its practical effect will be to nullify in a great measure at least, the preemption laws, and either upset or cause a feeling of insecurity concerning nearly all of our preemption patents. Under these circumstances, I thought it my duty not only to urge the rights of my client, but to present the matter to the thoughtful consideration of the different members of this Court.

I respectfully submit these views for consideration.

S. F. LEIB,
Attorney for Plaintiff in Error.